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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-344

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1,
SASOC, AFL-CIO,

Petitioner,

—against—

BOSTON CHANCE, LOUIS MERCADO, ET AL.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

LEONARD GREENWALD
80 Eighth Avenue
New York, New York 10011
Counsel for Petitioner

Of Counsel:

GRETCHEN WHITE OBERMAN
FRANKLE & GREENWALD

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The petitioner, Council of Supervisors and Administrators of the City of New York, Local 1, SASOC, AFL-CIO (hereafter "CSA") the exclusive bargaining representative of all employees of the Board of Education serving in supervisory or administrative positions in New York City, the intervenor below, respectfully prays that a writ of certiorari issue to review that portion of the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered on January 19, 1976, and its order on rehearing entered May 17, 1976, which direct the District Court to award constructive seniority to various members of respondents' class.

Opinion Below

The opinion and order on rehearing of the Court of Appeals are reported at 534 F.2d 993.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 19, 1976. A timely petition for rehearing and for rehearing *en banc* was filed by respondents. On May 17, 1976, rehearing was granted, and the panel's decision was amended. Rehearing *en banc* was denied June 9, 1976, and this petition for certiorari was filed within 90 days of that date.* The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Whether this Court's decision in *Washington v. Davis*, 44 U.S.L.W. 4789 (1976) precludes any award of constructive seniority in this case and requires summary reversal.
2. Whether—where a state statute mandates the use of "first-hired, last-fired" to regulate layoffs of public school supervisors and administrators—a federal court has power, in a § 1983 (42 U.S.C.) action to redress discrimination in hiring, to order a public employer to act contrary to the statute in the absence of any allegation or finding that the statute discriminates on its face and cannot be said to serve a purpose the state is constitutionally empowered to pursue.

* Petitioner's motion for rehearing and rehearing *en banc* filed after the grant of respondents' motion for rehearing was denied July 23, 1976.

3. Assuming that a state statute containing a "first-hired, last fired" provision is not entitled to greater deference than a private employment contract with such a provision, does a federal court, in a § 1983 (42 U.S.C.) action to redress discrimination in hiring, have the power to vary the seniority system without determining whether retention of the most senior supervisory and administrative personnel in the education system is a business necessity?

4. Whether, in a § 1983 (42 U.S.C.) action to redress discrimination in hiring, a federal court has power to award constructive seniority to persons who never applied for and hence were never wrongfully denied employment simply because the existence in the past of discriminatory employment practices may have discouraged such persons from seeking such employment.

Statutory Provisions Involved

42 U.S.C. § 1983: Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

New York Education Law § 2585:

§ 2585. Continuation in office of boards, bureaus, teachers, principals and other employees, et cetera

1. Except as otherwise provided herein the boards, bureaus, teachers, principals, supervisors, superintend-

ents, heads of departments, assistants to principals, examiners, supervisors of lectures, directors and all other officers and employees of the school systems or of boards of education of the several cities of the state, lawfully appointed or assigned before June eighth, nineteen hundred seventeen, shall continue to hold their respective positions for the term for which they were appointed or until removed as provided in subdivision five of section twenty-five hundred twenty-three of this article.

2. If a board of education abolishes an office or position and creates another office or position for the performance of duties similar to those performed in the office or position abolished, the person filling such office or position at the time of its abolishment shall be appointed to the office or position thus created without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled.

3. Whenever a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued.

4. In a city having a population of one million or more, no member of the teaching or supervising staff who has been regularly appointed in accordance with merit and fitness, determined by competitive examination, shall be dismissed upon the abolition of his position if:

a. The superintendent of schools, upon the recommendation of the board of examiners, certifies to the board of education that such member is competent to serve in any vacant position in the same rank or level or in a lower rank or level of service with such board; and

b. The superintendent of schools, upon direction of the board of education, assigns such member to any such vacant position, in which event such member so assigned shall serve in such position without reduction of salary.

5. If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled. The persons on such preferred list shall be reinstated or appointed to such corresponding or similar positions in the order of their length of service in the system.

Statement of the Case

1. Background: The Preliminary Injunction

In 1970, the respondents brought a § 1983 action against the New York City Board of Examiners and Board of Education to enjoin them from administering competitive examinations, used since the 1920's, for qualifying persons for permanent appointment to supervisory positions in the city school system, alleging that these examinations discriminated against blacks and Puerto Ricans. The District Court "found sufficient merit in [respondents'] case to preliminarily enjoin the Board from using the examinations," concluding that their use had "led to unintentional discrimination," because of the disparate pass-fail ratio between white and

minority group applicants and because the Board failed to demonstrate that the examinations were required for successful job performance. *Chance v. Board of Examiners*, 458 F.2d 1167, 1169-1171 (2d Cir. 1972). These findings of fact and conclusions of law were affirmed by the Second Circuit in 1972. *Chance v. Board*, *supra*.

The CSA was not a party to the District Court proceedings resulting in issuance of the temporary injunction, or its affirmance on appeal, having been refused intervenor status in the District Court on the ground it had no interest in the subject matter of the action. *Chance v. Board of Examiners*, 51 F.R.D. 156 (S.D.N.Y. 1970).* It did file an amicus curiae brief in the Court of Appeals urging reversal of the temporary injunction order.

2. Background: The Stipulation of Settlement

After affirmance of the District Court's order granting respondents' the temporary injunction, the respondents and the defendant Board of Examiners entered into a stipulation of settlement, agreeing to the use of an interim system of appointment to fill supervisory positions until an acceptable permanent examination system was devised. The stipulation was approved by order of the district court, and the district court order was later affirmed by the Court of Appeals over objections by the defendant Board of Education not relevant to this petition. *Chance v. Board of Examiners*, 496 F.2d 820 (2d Cir. 1974).

* The District Court held that unlike cases where union intervention was granted "to protect the job security of its members . . . there is no danger to the job security of the CSA members if the *Chance* plaintiffs would be successful in this action" since the relief, if granted "will only affect future examinations and the hiring of future personnel." 51 F.R.D. at 158.

The CSA was not a party to the proceedings leading to the settlement agreement, its approval in the District Court and the affirmance on appeal, having once again been denied intervenor status by the District Court before settlement of the decree.*

3. Background: The District Court Rules that the CSA Was Not A Party to the Litigation Culminating In The Consent Decree.

In a proceeding ancillary to the consent judgment for costs and legal fees in connection with the matters on which they had prevailed in the District and Circuit Courts, the District Court held that respondents were not entitled to such an award against the CSA, the petitioner herein, as it was not a party to the litigation prior to July 18, 1974, when it was granted intervenor status on the limited issue of excessing. *Chance v. Board of Examiners*, 70 F.R.D. 334, 340 (S.D.N.Y. 1976). The respondents never appealed from that determination.

4. The Present Controversy: Constructive Seniority for Members of Respondents' Class Who Failed or Did not Apply To Take Pre-Injunction Examinations

In the Spring of 1974, discussions between the respondents and the defendant Boards turned from formulation of the prototype examinations to be administered

* The opinion of the court denying the intervention motion was filed July 10, 1973, and is unreported. See *Chance v. Board of Examiners*, *supra* 496 F.2d at 822 n. 4.

to new applicants for supervisory positions to the procedure to be used for the "excessing" of previously appointed supervisory personnel from positions which might be terminated.

For the past 60 or so years, the Board of Education followed a first hired-last fired rule in determining which supervisors serving in the City schools would be adversely affected by job termination. As the Court of Appeals below states, the excessing rules in use before the respondents challenged them provided:

"... that when a position in a school district is eliminated, the least senior person in the job classification used to fill that position shall be transferred, demoted or terminated. It is a system which recognizes the value of pedagogical experience and seniority and its use is mandated by the New York Education Law (3a)."

The respondents challenged the Section 2585 excessing rules in two legal memoranda filed in July and September of 1974 and in various appearances before the District Court for oral argument. They relied upon the theory enunciated in the then unreversed district court decision in *Watkins v. Steel Workers Local 3369*, 369 F. Supp. 1221 (E.D. La. 1974), reversed 516 F.2d 41 (5th Cir. 1975), that it is permissible to alter—on a class basis, and through the use of racial quotas—even a *bona fide* nondiscriminatory seniority system where there has been past discrimination in hiring.

* The collective bargaining agreement between the CSA and the Board of Education recognizes that Section 2585 governs excessing practice and gives controlling effect to the statute.

The text of N.Y. Ed. Law § 2585 governing seniority excessing is set out *supra* at pp. 3-5.

The petitioner CSA once again moved to intervene as a party-defendant, and its motion was granted by the District Court on July 18, 1974.

On February 7, 1975, the respondents obtained a district court order which superimposed a racial quota requirement upon the excessing procedures mandated by Section 2585 and theretofore followed by the Board of Education (6a). The order was reversed by the Court of Appeals in January 19, 1976. *Chance v. Board of Examiners*, 534 F.2d 993, reproduced 1a-28a *infra*.

In its opinion reversing the District Court order, the Court of Appeals below also discussed the concept of constructive seniority, i.e., preferential treatment for "... a minority worker ... kept from his rightful place on the seniority list by his inability to pass a discriminatory examination ..." (10a). The Court of Appeals below noted that the propriety of such constructive seniority awards was then *sub judice* in this Court and stated:

"Upon remand of this case, the District Court may find it unnecessary to await resolution of this dispute by the Supreme Court. The defendant Board of Education has indicated its willingness to accord constructive seniority to any minority supervisor who failed an examination since invalidated as discriminatory by giving him a date of appointment which is the mean appointment date of those who passed the examination. We believe this offer of compromise which appears to be acceptable to the intervening union should have been adopted by the District Court." (11a).

The respondents filed a timely motion for rehearing and rehearing *en banc* after the Court of Appeals reversal. Their motion was amended after this Court's decision in *Franks v. Bowman Transportation Co.*, 44 U.S.L.W. 4356

(1976), to request, *inter alia*, a modification of the Circuit Court decree to provide constructive seniority to those members of respondents' class who "have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination to be discriminatory and unrelated to job performance" (30a), as well as for the group covered by the Board of Education offer of compromise.

On May 16, 1976, the Court of Appeals panel granted rehearing and modified its decree to accord constructive seniority relief to this additional part of respondents' class (30a).

Rehearing was granted without calling for a response to the petition pursuant to Rule 40, F.R.A.P., and despite a written request by the CSA not to act on the respondents' request for additional relief, made for the first time in the rehearing petition and not briefed or argued in the District Court or on appeal, "in a forum where no appropriate factual determinations can be made and in a proceeding where no adversary argument is accorded as of right." *

After the grant, *ex parte*, of rehearing by the panel, the CSA filed a petition for rehearing and rehearing *en banc*. In it the CSA argued, as the panel had initially recognized (11a), that the constructive seniority issue came into the case only through an offer of compromise by the Board of Education as to a limited part of respondents' class. Hence there was no basis in the record—factual or legal—to determine the propriety of a court ordered award of relief to a different group not included in the offer of settlement. The CSA argued that there

were at least two issues which had to be resolved before relief beyond the offer of compromise could be ordered: first, whether the business necessity doctrine is applicable in a case involving pedagogical, not factory, personnel; and second, whether the fact that seniority excessing in the New York City school system is mandated by a New York statute and is not merely the creation of a private collective bargaining contract requires a different standard of judicial review.

While the CSA rehearing petition was pending, this Court decided *Washington v. Davis*, 44 U.S.L.W. 4789 (1976), holding that the lower court in that case erroneously applied a Title VII (42 U.S.C.) standard in a § 1983 case to resolve the constitutional issue of discriminatory hiring by a public employer. The Court specifically disapproved the Second Circuit's decision in the first *Chance* case. 44 U.S.L.W. at 4793 n. 12.

The CSA brought the *Washington* case to the attention of the Court of Appeals below by letter of June 28, 1976, arguing that it supported the CSA position that a seniority system mandated by a valid state statute—never declared or challenged as unconstitutional—was entitled to different consideration than a seniority system created by a private commercial contract. The Court of Appeals denied the CSA petition for rehearing and rehearing *en banc* on July 23, 1976.

* CSA opposition to appellees' motion for leave to amend this petition for rehearing, filed April 6, 1976.

Reasons for Granting The Writ

POINT I

SUMMARY REVERSAL IS REQUIRED BECAUSE THE COURT'S HOLDING IN *WASHINGTON v. DAVIS, SUPRA*, HAS DISAPPROVED AND OVERRULED THE LAW APPLIED BY THE COURT BELOW TO DETERMINE THE UNDERLYING ISSUE OF RACIAL DISCRIMINATION IN PUBLIC HIRING. THE PETITIONER—NOT A PARTY TO THE PRIOR DECISION BELOW ON THAT ISSUE—IS FREE TO ASK FOR ITS REDETERMINATION BY THE COURT IN THIS CASE.

After the opinion below was rendered, this Court, specifically disapproved the conclusion of law enunciated and applied in the first *Chance* decision (*supra*, 458 F.2d 1167), that:

“. . . the substantially disproportionate racial impact of a statute or official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications.” *Washington v. Davis, supra*, 44 U.S.L.W. at 4792.

The Court of Appeals decision below awarding constructive seniority to various members of respondents' class is premised entirely upon its holding in the first *Chance* case (*supra*, 458 F.2d 1167) that these individuals had been the subject of unconstitutional discrimination in hiring (9a).

The respondents never alleged or established that the statutes and practices regulating hiring before the *Chance* action was filed were discriminatory under the

constitutional standard applied and approved in *Washington v. Davis, supra*. They, like the Court of Appeals below, relied only upon the now overruled legal principle in the first *Chance* case, that the hiring procedure for supervisory positions in the New York City school system had a disproportionate, though “unintentional”, racial impact,* and hence that constructive seniority was necessary to remedy that underlying wrong.

The decision below recognizes that an award of preferential treatment for seniority purposes to any minority group individual can be sustained “because, and only to the extent that, he has been discriminated against” (10a). Since, under *Washington v. Davis, supra*, there is no longer any basis for the legal conclusion that the New York City hiring practices constituted racial discrimination forbidden by the Fourteenth Amendment, the award of constructive seniority to members of respondents' class—predicated, as it is, on this invalid conclusion of law—must be vacated.

Neither the fact that the first *Chance* case resulted in a final consent judgment changing the competitive examination procedure in effect when some of respondents' class sought supervisory positions, nor the fact that it directly involved the respondents and other parties in this case, requires this Court to apply the disapproved *Chance* conclusion of law to the matter at bar instead of the proper constitutional standard mandated by *Washington v. Davis, supra*.

The petitioner herein was not a party to the prior injunction action and consent decree and is not bound

* “Despite the spendidly motivated genesis of the Board of Examiners, its examinations, according to the District Court, have led to unintentional racial discrimination.” *Chance v. Board of Examiners, supra*, 458 F.2d at 1170.

by the judgments in those cases either on either the theory of collateral estoppel or of *res adjudicata*. The petitioner was denied the opportunity to intervene in the action resulting in the preliminary injunction and consent decree (*supra*, pp. 5 to 7). When the district below had to determine CSA status upon respondents' motion ancillary to the consent decree for costs and attorneys fees, the court ruled that CSA was not a party to the action. Respondents never appealed from this determination. It is hornbook law that one whose motion to intervene is denied is not precluded on the merits by a final judgment in that law suit. *Brown v. Wright*, 137 F.2d 84 (4th Cir. 1943); 1B Moore's Federal Practice, "*Res Adjudicata* and Related Doctrines," § 0.411[1], p. 1253.

The district court determination that petitioner's limited participation as an amicus did not render it a party to the law suit was correct in all respects. Petitioner had no control of the defense of the law suit or of the defendant's decision not to appeal but rather to compromise the case by settlement agreement after the Court of Appeals decision on the preliminary injunction—the prerequisites for finding non-party participation sufficient for *res adjudicata* or collateral estoppel purposes under federal law. *Rumford Chemical Work v. Hygienie Chemical Corp.*, 215 U.S. 156, 160 (1909); *Litchfield v. Goodnow*, 123 U.S. 549, 551 (1887); Moore, *supra*, § 0.411 [6], pp. 1564-65.

Petitioner, not a party to the prior action on discrimination in hiring litigated by respondents and other parties-defendant, is not bound by the determination of that issue. It is free to rely upon the overruling effect of this Court's subsequent decision in *Washington v. Davis*, *supra*, to the same extent as any other stranger to the initial litigation in this case, and to demand judgment in accord with the applicable law.

Since the decision below is directly in conflict with this Court's decision in *Washington v. Davis*, *supra*, on the issue of discrimination in hiring—the precedent determination to the award of constructive seniority by the court below—it must summarily reversed.

POINT II

ASSUMING THAT SUMMARY JUDGMENT IS NOT WARRANTED, OTHER SUBSTANTIAL ISSUES NOT YET DECIDED BY THIS COURT ARE PRESENT IN THIS CASE AND REQUIRE A GRANT OF CERTIORARI.

The Court below relied upon this Court's decision in *Franks v. Bowman*, *supra*, 44 U.S.L.W. 4356, as authority for its award of constructive seniority in this case. There are three salient points of distinction between this case and *Franks*. Each raises a significant issue not yet decided by this Court and warrants a grant of certiorari, even assuming that summary reversal is not appropriate.

1. This Court Has not Decided Whether a Federal Court Has Power to Vary the Seniority System for Public Employees Mandated By a Valid State Statute, Never Declared Unconstitutional, In Order to Remedy Past Discrimination in Hiring.

The seniority system in this case is not the creation of a collective bargaining contract between an employer and labor union as it was in *Franks v. Bowman*, *supra*. The seniority system at issue here is mandated by a valid, non-discriminatory state statute, recognizing "the value of pedagogical experience and seniority" (3a), and reflecting a considered legislative determination

that the needs of its own education system are best served by retention of the most experienced personnel when jobs are terminated. Certainly the classification employed by the statute is "reasonable, not arbitrary . . . and bears a rational relationship to a permissible state objective." *Village of Belle Terre v. Borass*, 416 U.S. 618 (1975).

Franks v. Bowman, supra, does not hold that the same considerations permitting a federal court to vary the seniority system created by a private contract also allow this when seniority rules result by operation of a valid, non-discriminatory state statute employing no suspect classifications, and never used as a subterfuge to discriminate against educational personnel on the basis of race.

In a recent case, the New York Court of Appeals held that the power of the State Commission of Human Rights to redress past discriminatory employment practices does not include the power to order a public employer to act in a manner contrary to other valid provisions of the State civil service law. *Schenectady v. State Commission of Human Rights*, 37 N.Y.2d 421, 430 (1975). The decision below gives no consideration at all to the fact that seniority excessing in this case is required by a valid and unchallenged state statute.

This Court should decide whether the power of a federal court to redress discrimination in a § 1983 action, includes, as the Court below implicitly held, a greater power than the New York Court is willing to grant in similar circumstances—namely the power to order a public employer to act contrary to other valid, non-discriminatory state statutes regulating seniority—or whether a seniority system created by such a valid statute is entitled to greater deference than *Franks*

requires in a case involving seniority rules created by private contract.

Determination of this issue will have significance beyond its applicability to the case at bar. Virtually every public education system operates on the basis of excessing rules like those required by New York Education Law 2585. The rationale behind the widespread use of seniority excessing in public education is obvious. The skills necessary to successful job performance in this field are acquired through actual job experience. The most valuable personnel which a system can retain in the lay-off situation are its most experienced. As long as the decision below stands unreviewed, the federal courts are free to substitute their judgments on seniority rules for those arrived at by state legislatures without giving any weight whatsoever to reasonable state standards.

Certiorari should be granted to resolve the conflict between the decision below and the New York Court of Appeals decision in the *Schenectady* case, *supra*, and to decide this question of national significance.

2. This Court Has Not Decided Whether Seniority Excessing in Public Education Is A Business Necessity. Moreover, the Decision Below Is In Direct Conflict with Recent New York Court of Appeals Cases.

The only issue before this Court for decision in *Franks v. Bowman, supra*, was whether constructive seniority was an appropriate remedy in a case where no party ever claimed that the seniority system was a business necessity. The lower court decision in that case both recognized that the business necessity doctrine applies in making this determination and was careful

to note that "neither Bowman nor the union has attempted to defend the seniority system as a 'business necessity'." 495 F.2d 398, 415.

The petitioner urged the Court below to consider that this case involved school supervisors—principals, department heads and school administrators—and not assembly line employees or truck drivers, before varying the seniority excessing rules. Petitioner argued that seniority excessing had a legitimate pedagogical purpose and was a business necessity in the context of a public school system. While the Court below acknowledges the legitimate and important function of seniority excessing in a public school system (3a), it totally failed to accord any weight to this factor in fashioning the relief granted in this case.

The supervision and administration of a system of public education is primarily the responsibility of those equipped with special skills and necessary experience for so critical a task. This Court should grant certiorari to decide what balance must be achieved between the importance to a public school system in maintaining a senior, experienced administration when layoffs occur and the necessity for constructive seniority as a remedy to enforce anti-discrimination laws in such a case.

Determination of this issue by the Court is necessary for the further reason that a conflict exists between the decision below and the New York Court of Appeals cases on the appropriateness of equitable remedies to redress racial discrimination which affect seniority rules and practices in educational institutions generally—even when those rules are not mandated by state statute.

The New York Court of Appeals in a series of recent decisions has held that neither the State Commissioner of Human Rights nor the courts "should invade, and only

rarely assume academic oversight, except with greatest caution and restraint, in such sensitive areas as faculty appointment, promotion and tenure . . ." *Matter of Pace College v. Commission on Human Rights*, 38 N.Y.2d 28, 38 (1976); *State Division of Human Rights v. Columbia University*, 39 N.Y.2d 612 (1976); *Matter of New York Institute of Technology v. State Division of Human Rights*, — N.Y.2d —, decided July 8, 1976 and not yet reported.

In the *Pace College* case, *supra*, 38 N.Y.2d at 38, the New York Court of Appeals held that educational institutions "are not 'businesses' where employees are all fairly fungible unskilled or semi-skilled workers," but are places where "subjective judgments necessarily have a proper and legitimate role."

In *Matter of New York Institute of Technology*, *supra*, the New York Court held that while the Commissioner may have the power to grant tenure to an employee denied it on the basis of a discriminatory classification, "its employment must be carefully restricted to only the most extraordinary situations." This restriction is necessary because of the unique social role of educational institutions and because the decisions on appointment, promotion and retention of school personnel are among the most sensitive and important to the proper functioning of the school system as a whole.

The Court below granted constructive seniority without considering the impact of such relief upon the proper administration and functioning of the New York City School system, and without considering—as the New York Court of Appeals holds is necessary—whether this is one of those "gravest of circumstances, where all other conceivable remedies have proved ineffective or futile . . ." *Matter of New York Institute of Technology*, *supra*.

Certiorari should be granted to resolve this conflict between the decision below and the New York Court of Appeals decisions; and also because the issue, one of first impression in this Court, has potentially broad consequences for public school systems throughout the country.

3. This Court Has Not Decided Whether Persons Who Never Applied for Employment Because of a Subjective Belief that Hiring Practices Were Discriminatory Are Entitled to an Award of Constructive Seniority.

In *Franks v. Bowman*, *supra*, 44 U.S.L.W. 4355, 4361 this Court held that "a seniority remedy slotting the victim in the position in the seniority system that would have been his had he been hired at the time of his application" is ordinarily necessary to achieve the "make-whole" purposes of Title VII. It did not consider whether Title VII also requires the far broader relief, granted by the Court below, of slotting persons in a seniority system simply because they failed to apply for employment on the subjective belief that employment qualifications were discriminatory and unrelated to job performance.

In *Franks v. Bowman*, *supra*, 44 U.S.L.W. at 4361, this Court recognized that "competitive status" seniority plays a broad role in modern employment systems. Indeed the dissenting opinions in *Franks* took the position that an award of constructive competitive status seniority, even to one who actually applied for and was wrongfully denied employment, is "drastic relief" which should be granted only after a careful balance of the competing equities, since,

"There will be cases where, in all of the circumstances, the economic penalties that would be imposed on innocent incumbent employees will out-

weigh the claims of discrimination victims to be made entirely whole even at the expense of others."

44 U.S.L.W. at 4370.

The senior supervisory personnel represented by petitioner and now subject to job termination were never involved in formulating or administering the examinations for licenses, testing procedures and the like which the lower court found to be unintentionally discriminatory in the first *Chance* case. See especially *Chance v. Board of Examiners*, *supra*, 51 F.R.D. at 157-158. Yet by the decision below these "innocent incumbents" not only must be downgraded in seniority status to accommodate the claims of junior persons who were actively discriminated against; they must also suffer further downgrading to satisfy the claims of persons who only subjectively believed themselves to be victims of discrimination.*

Such an extension of the *Franks v. Bowman* rationale is not warranted under Title VII to achieve its objective. Moreover, it will require district courts to make impossible factual determinations in order to decide whether a person's failure to apply for employment was motivated by a reasonable belief that hiring procedures were discriminatory and unrelated to job performance, or by other factors having nothing to do with past discrimination in hiring. The legitimate seniority expectations of innocent incumbent employees should not be defeated by incorporating this totally subjective standard into Title VII litigation without full review and consideration by this Court. For this further reason, certiorari should be granted in this case.

* For other problems inherent in this type of relief, see *Jones v. Pacific Intermountain Express*, 536 F.2d 817, 820 (9th Cir. 1976).

CONCLUSION

For these reasons, the judgment and opinion of the Second Circuit should be summarily reversed; alternatively, a writ of certiorari to review that judgment and opinion should be granted.

Respectfully submitted,

LEONARD GREENWALD
80 Eighth Avenue
New York, New York 10011
(212) 242-0200
Counsel for Petitioner

APPENDIX

Of Counsel:

GRETCHEN WHITE OBERMAN
FRANKLE & GREENWALD

Dated: New York, New York
September 2, 1976

APPENDIX A-OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1112, 1251—September Term, 1974.

(Argued August 11, 1975 Decided January 19, 1976.)

Docket Nos. 75-7161—75-7164

BOSTON M. CHANCE, LOUIS C. MERCADO, individually
on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK: GERTRUDE E. UNSER, individ-
ually and in her capacity as Chairman of the Board
of Examiners; JAY E. GREENE, MURRAY ROCKAWITZ and
PAUL DENN, individually and in their capacities as mem-
bers of the Board of Examiners; MURRY BERGTRAUM,
individually and in his capacity as President of the
Board of Education; ISIAH E. ROBINSON, Jr., individ-
ually and in his capacity as Vice-President of the Board
of Education; MARY E. MEADE, SEYMOUR P. LACHMAN
and JOSEPH MONSERRAT, individually and in their capaci-
ties as members of the Board of Education; HARVEY B.
SCRIBNER, individually and in his capacity as Chancellor
of the City School District of the City of New York;
and THEODORE H. LANG, individually and in his capacity

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as Deputy Superintendent of Schools of the City of New York,

Defendants-Appellants.

and

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASCO, AFL-CIO,

Intervenor-Appellant.

Before:

OAKES, VAN GRAAFEILAND and MESKILL,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Harold R. Tyler, *Judge*, which superimposed a racial quota requirement upon the "excessing" procedures of the New York City Board of Education.

Reversed and remanded.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, New York, N. Y., for Defendant *The Board of Examiners*.

W. BERNARD RICHLAND, Corporation Counsel of the City of New York, New York, N. Y. (L. Kevin Sheridan, Leonard Koerner, Leonard Bernikow, New York, N. Y., of Counsel), for Defendant *The Board of Education of the City of New York*.

MAX H. FRANKLE, LEONARD GREENWALD, New York, N. Y. (Gretchen White Oberman, New York, N. Y., of Counsel), for Intervenor-Appellant.

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venor-Appellant Council of Supervisors and Administrators of the City of New York, Local 1, SASCO, AFL-CIO.

JACK GREENBERG, DEBORAH M. GREENBERG, New York, N. Y., ELIZABETH B. DU BOIS, JEANNE R. SILVER, GEORGE COOPER, New York, N. Y., for Plaintiffs-Appellees.

—♦—
VAN GRAAFEILAND, *Circuit Judge:*

This is an appeal from an order of the United States District Court for the Southern District of New York which directed the Board of Education of the City of New York to "excess" supervisory personnel in accordance with a formula imposing racial quotas upon the excessing process. Excessing rules provide in brief that when a position in a school district is eliminated, the least senior person in the job classification used to fill that position shall be transferred, demoted or terminated. It is a system which recognizes the value of pedagogical experience and seniority, and its use is mandated by the New York Education Law¹

¹ Section 2585 of the Education Law § 2585 (McKinney 1970) provides in pertinent part as follows:

2. If a board of education abolishes an office or position and creates another office or position for the performance of duties similar to those performed in the office or position abolished, the person filling such office or position at the time of its abolishment shall be appointed to the office or position thus created without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled.

3. Whenever a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued.

4. In a city having a population of one million or more, no member of the teaching or supervising staff who has been regularly appointed in accordance with merit and fitness, determined by com-

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and the Collective Bargaining Agreement between the Board of Education and the supervisors' union.² We believe that the District Court erred in injecting into this plan a requirement for conformity to a racial quota formula, and we therefore reverse.

Fortunately for both reader and writer, we find it unnecessary to recount at length the history of this extended litigation. A summary of the proceedings which now bring the parties to our Court for the fourth time³ will suffice.

This civil rights class action was begun in 1970 for the purpose of correcting an underrepresentation of minorities in supervisory positions in the New York City school sys-

petitive examination, shall be dismissed upon the abolishment of his position if:

a. The superintendent of schools, upon the recommendation of the board of examiners, certifies to the board of education that such member is competent to serve in any vacant position in the same rank or level or in a lower rank or level of service with such board; and

b. The superintendent of schools, upon direction of the board of education, assigns such member to any such vacant position, in which event such member so assigned shall serve in such position without reduction of salary.

5. If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled. The persons on such preferred list shall be reinstated or appointed to such corresponding or similar positions in the order of their length of service in the system.

2 The Collective Bargaining Agreement contains a set of detailed excessing rules. In addition, it provides that the "provisions of law" will be followed in all City-wide excessing situations.

3 See *Chance et al. v. Board of Examiners, et al.*, 458 F.2d 1167 (2d Cir. 1972); *Chance v. Board of Examiners*, 496 F.2d 820 (2d Cir. 1974). On May 15, 1974, this Court dismissed a third appeal without opinion. *Chance v. Board of Examiners*, 497 F.2d 919 (2d Cir. 1974).

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tem. Employment qualification tests, one of the alleged causes of such disproportion, were thereafter invalidated by the District Court as not job-related; and an interim system of job assignment was created by court order, the details of which are spelled out in our 1974 decision. Because this interim plan provided in part that job assignment would precede licensing and that permanent appointment would follow on-the-job evaluation, it became necessary for the Board of Education to formulate new rules concerning date of appointment for excessing purposes. These rules, which were submitted to the District Court for approval, provided in substance that, in determining seniority for excessing purposes, supervisors would be considered appointed as of the date of their assignment.

As Judge Tyler graphically pointed out during one of the many arguments below, this law suit has been "like a conflagration that one puts out in one department and then suddenly a new fire breaks out somewhere else." It was not surprising, therefore, that this submission by the Board set new flames burning. Plaintiffs promptly opposed the use of any excessing rules on the ground that minority supervisors recently hired would have the least seniority. This prompted intervention by the Council of Supervisors and Administrators of the City of New York, Local 1, SASCO, AFL-CIO as the representative of all supervisory personnel, including those licensed and appointed prior to the court-ordered interim plan, those licensed and appointed pursuant to such plan and those assigned but not yet appointed. This Union opposed the use of racial quotas and supported the continued use of traditional excessing procedures. Amicus briefs were also filed by the New York City School Boards Association, Inc. whose interest lay in seeing that the powers and prerogatives of the thirty-two school districts within the New York system were not eroded by the court-created excessing plan.

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Proposals and counterproposals followed closely upon each other until Judge Tyler handed down an order on November 22, 1974, adopting the racial quota concept. This order was amended on February 7, 1975, and it is the amended order which we are reviewing on this appeal. It provides in substance as follows:

1. All supervisors are to be divided into three groups: group A—Blacks, group B—Puerto Ricans and group C—Others;
2. The percentage of supervisors making up each group is to be computed for each of the thirty-two districts and for the city-wide system;
3. Each district may place supervisors from group A or B on its intra-district excessing list only if the percentage of that group on the list does not exceed the percentage of that group in the district;
4. Each district may add excessed supervisors from group A or B to the city-wide, inter-district excessing list only if the percentage of that group on the list does not exceed the percentage of that group employed city-wide.

Although the order does not specifically so provide, the inevitable consequence of the foregoing provisions is that if racial quotas prevent the excessing of a Black or Puerto Rican, a white person with greater seniority must be excessed in his place.

Before the merits of the appeals taken by the Board of Education and the Council of Supervisors can be considered, several preliminary roadblocks raised by plaintiffs must first be removed. Plaintiffs contend that the appeals are not timely. They say that the order of February 7, 1975, merely clarified the order of November 22, 1974, and

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that therefore appeals should have been taken from the former, not the latter. We find no merit in this contention. Following the issuance of the November 22 order, the Board of Education requested a modification "concerning excessing." A hearing was held, and some modifications were made. We think that the Board's application, addressed sufficiently to the substance of the November order to require a contested rehearing, effectively transferred the mantle of finality from the November to the February order and that appeals from the latter order were therefore timely. *Leishman v. Associated Electric Co.*, 318 U.S. 203 (1943); *Sleek v. J. C. Penney Company*, 292 F.2d 256 (3d Cir. 1961).

Plaintiffs also point out that the order appealed from will be in effect only until November 30, 1977, by which time "it is hoped" the situation regarding minority representation will have changed. Plaintiffs urge that we not concern ourselves, as an appellate court, with this short-term interim relief. In our 1974 decision, at page 825, we expressed concern about the length of time this litigation had remained in an unfinished state and the possibility that "the interim tail" would end up wagging the dog. Another year has passed; the lawsuit has not been terminated, and new orders continue to emerge. Those supervisors who may lose their jobs between now and November 30, 1977, will be little comforted by the knowledge that it was merely a temporary order that put them out of work. Where the basic rights of such innocent non-litigants are so substantially involved, we believe we should, as we have twice before, review what has been done.

We thus come to the main question on this appeal, viz.: does a facially neutral excessing plan, which operates on the concept of "last hired-first fired," discriminate against minorities who are disproportionately affected? We agree

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with the Courts of Appeals of the Third, Fifth and Seventh Circuits that the answer to this question must be "no." See *Waters v. Wisconsin Steel Works of International Harvester Company*, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 44 U.S.L.W. 3011 (Apr. 25, 1975); *Jersey Central Power and Light Co. v. Local Union 327, I.B.E.W.*, 508 F.2d 687 (3d Cir. 1975), *petitions for cert. filed*, 44 U.S.L.W. 3084 (Aug. 1, 1975), 44 U.S.L.W. 3207 (Sept. 24, 1975); *Watkins v. Steel Workers Local No. 2369*, 516 F.2d 41 (5th Cir. 1975).

Our brothers in the Third and Seventh Circuits have examined the legislative history of Title VII⁴, and they are in accord that this Act was not intended to invalidate *bona fide* seniority systems. *Waters, supra*, 502 F.2d at 1318; *Jersey Central, supra*, 508 F.2d at 710. Our brothers in the Fifth Circuit say that "regardless of what that history may show as to congressional intent concerning the validity of seniority systems as applied to persons who have themselves suffered from discrimination, there was an express intent to preserve contractual rights of seniority as between whites and persons who had not suffered any effects of discrimination." *Watkins, supra*, 516 F.2d at 1302. All agree, as do we, that the non-remedial distortion of a seniority system through preferential treatment based solely upon race is a form of reverse discrimination specifically proscribed by Congress. *Jersey Central, supra*, 508 F.2d at 709; *Waters, supra*, 502 F.2d at 1319; *Watkins, supra*, 516 F.2d at 1301. See also *Local 189, United Papermakers v. United States*, 416 F.2d 980, 994 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

That plaintiffs herein are proceeding under 42 U.S.C. §§ 1981, 1983 does not render defendants' seniority system any more susceptible to attack. Congress has clearly placed

⁴ 42 U.S.C. § 2000e, *et seq.*

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its stamp of approval upon seniority systems in 42 U.S.C. § 2000(e)(2).⁵ Whether this section be considered a repeal by implication of any possible contrary construction of § 1981, or simply a statement of guiding legal principles, we agree with the court in *Waters* that "having passed scrutiny under the substantive requirements of Title VII, the employment seniority system . . . is not violative of 42 U.S.C. § 1981." *Waters, supra*, 502 F.2d at 1320 n.4.

The relief fashioned by the court below was not designed to benefit only those affected by the employer's prior discriminatory conduct⁶ or to insure that the excessing program operated in a non-discriminatory manner. It was intended to insure that there would continue to be a specified quota of Blacks and Puerto Ricans employed in the New York City school system. Our limited approval of the use of racial hiring quotas in such cases as *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), and *Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973), is not authority for what the district court has done. We were concerned in those cases with discriminatory hiring practices, and the remedial relief which we approved concerned only hiring procedures. Because there is no claim that defendants' excessing practices are or have been discriminatory, we see no justification for changing them.

⁵ 42 U.S.C. § 2000e-2(h) provides in pertinent part that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin"

⁶ Plaintiffs concede that only a small percentage of the minority supervisors appointed since the inception of this litigation failed the examinations found to be discriminatory, and there is no showing as to how many were even eligible to take such examinations.

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Moreover, the concern which we expressed in *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), about the "bumping" effect of a quota "upon a small number of readily identifiable" individuals finds equal cause for expression in the situation which now confronts us. We are advised that in some of the school districts employees will be excessed from groups containing as few as two or three persons. To require a senior, experienced white member of such a group to stand aside and forego the seniority benefits guaranteed him by the New York Education Law and his union contract, solely because a younger, less experienced member is Black or Puerto Rican is constitutionally forbidden reverse discrimination.⁷ *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 209 (1944) (Murphy, J., concurring); *Kirkland, supra*, 520 F.2d at 429.

If a minority worker has been kept from his rightful place on the seniority list by his inability to pass a discriminatory examination, he may, in some instances, be entitled to preferential treatment—not because he is Black, but because, and only to the extent that, he has been discriminated against. The "freedom now" and "rightful place" doctrines create constructive or fictional seniority to put minority employees in the approximate spot on the seniority list that they would have occupied had they not been the subject of discrimination. *Local 189, United Papermakers v. United States, supra*, 416 F.2d at 988. The former contemplates the displacement of white workers where necessary; the latter involves only the filling of vacancies. We have followed the "rightful place" doctrine

⁷ The discriminatory effects of such conduct would be even more apparent if the senior member were female and thus entitled to the same protection against discharge under § 2000e-2 as a Black. Indeed, if the quota system is proper, the day is not far away when women will seek its assistance in displacing minority workers.

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to the extent of using plant seniority, instead of departmental seniority, where departmental discrimination has prevented or delayed the transfer of minority workers. *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971).⁸

There is disagreement among the Circuits as to how far these concepts should be carried in creating fictional dates of employment for minority workers. Cf. *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), cert. granted, 419 U.S. 1050 (1975), argued November 3, 1975, 44 U.S.L.W. 3273; *Meadows v. Ford Motor Company*, 510 F.2d 939 (6th Cir. 1975). Upon remand of this case, the District Court may find it unnecessary to await resolution of this dispute by the Supreme Court. The defendant Board of Education has indicated its willingness to accord constructive seniority to any minority supervisor who failed an examination since invalidated as discriminatory by giving him a date of appointment which is the mean appointment date of those who passed the examination. We believe this offer of compromise which appears to be acceptable to the intervening Union should have been adopted by the District Court.

A reversal of the order appealed from renders moot the controversy between the Board of Education and the community districts as to whether intra-district as well as inter-district racial quotas should be used and applied in the excessing process. We note that the New York Court of Appeals has specifically held that the Board of Education has the power to establish uniform City-wide excessing rules. *Council of Supervisors and Administrators v. Board*

⁸ In *Bethlehem Steel*, we authorized the use of plant seniority only for the purpose of filling vacancies and not to "bump" white workers. We said, at 446 F.2d 661: "Both groups will bid against each other for vacancies on the basis of plant-wide seniority; an earlier hired white employee will have greater seniority than a later-hired black."

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of Education, 35 N.Y.2d 861 (1974) (mem.). Should the question of excessing authority vis-a-vis the community districts and the Board of Education again arise in this proceeding, we trust that the District Court will defer to the New York State courts' primary concern and expertise in this matter, in so far as it is feasible to do so.

Reversed and remanded for further proceedings in accordance with this opinion.

—♦♦♦—
OAKES, Circuit Judge (dissenting):

To my mind the issues are both more simple and more complex than the majority states. They are more simple in that what we are here concerned with is the fashioning of equitable relief under 42 U.S.C. § 1981¹ as a remedy for past racially discriminatory practices. The relief ordered by the district court limits transfers and layoffs of black and Hispanic school supervisors who have only been hired

1 The equitable powers of the district court under 42 U.S.C. § 1981 are at least as great as those under Title VII, § 706(g), 42 U.S.C. § 2000e-5 (g), which states in pertinent part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

An example of a court's broad utilization of those powers in connection with a facially neutral departmental seniority plan which froze black employees "into a discriminatory caste" is found in *Johnson v. Good-year Tire & Rubber Co.*, 491 F.2d 1364, 1373 (5th Cir. 1974), where the court said: "The principle of the illegality of a facially neutral seniority system superimposed on a history of employment discrimination is so well settled that extended discussion is unnecessary." See generally Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544 (1975).

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or promoted to their jobs as supervisors since the abolition by court order of racially discriminatory qualifying examinations.² This order seems to me to be one properly within the equitable power of the court as a device to protect the integrity of its remedial plan. It is true, however, that the percentage, or "quota," layoff limitation method of the district court was not the *only* permissible relief which could have been ordered. Were the only class involved that of persons, like the named plaintiff Chance, who were kept from their rightful place on the seniority list by their inability to pass the discriminatory examinations, I would agree with the majority that giving such persons "constructive seniority" effective as of the "mean appointment date" of those who passed the exam which the persons discriminated against had failed might very well be adequate and proper relief.³ But our case is more complex than this. There is a second class in the litigation before us which is composed of persons who, like the named plaintiff Mercado, "have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination system to be discriminatory and unrelated to job performance."⁴ These people, who

2 See *Chance v. Board of Education*, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972) (preliminary injunctive relief upheld); *Chance v. Board of Education*, 496 F.2d 820 (2d Cir. 1974) (permanent relief partially afforded).

3 Although it would not cover persons who were discouraged from taking the examinations for a period of years because of a reasonable belief that they were discriminatory but who subsequently took the examinations and failed.

4 *Chance v. Board of Examiners*, 70 Civ. 4141 [75-7161], May 21, 1973, order of Mansfield, J., at p. 7:

(1) Finding that all of the conditions precedent prescribed by Rule 23(a) for maintenance of the action as a class suit are met, we grant plaintiffs' motion pursuant to Rule 23(b)(2) for an order allowing it to be so maintained. The class shall include all Blacks and persons of Puerto Rican origin or descent who (1)

comprise by far the largest portion of the plaintiffs in this case,⁵ are left wholly unprotected by the "constructive seniority" approach of the majority. Since I believe the district court has discretion to make a reasoned choice among those remedies which are available to effect relief for those who have been injured by the discriminatory exams, and since in the situation before us the use of layoff quotas by the district court was an attempt to do rough justice where perfect equity was not achievable, I must respectfully dissent.

This litigation was begun in September of 1970, challenging the examinations used to select principals and other supervisory personnel in the city school system on the basis that the examinations discriminated unconstitutionally against minority groups. It was brought under 42 U.S.C. §§ 1981, 1983, and not under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.* But it is interesting to note that Section 703(h) of the latter, 42 U.S.C. § 2000e-2(h),⁶

have failed examinations for supervisory positions in the New York City School System; or (2) have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination system to be discriminatory and unrelated to job performance; or (3) have taken such supervisory examinations and have been or are in the process of being evaluated for eligibility lists to be promulgated; or (4) are eligible or will be eligible for supervisory examinations to be given in the future.

Although Judge Mansfield's order refers to Puerto Rican members of the discriminated class, I have followed the usage of the parties in their briefs and used the term "Hispanic" to refer to these persons.

5 Letter dated January 24, 1975, from Jeanne K. Silver, attorney for plaintiffs, to the Honorable Harold R. Tyler, then United States District Judge for the Southern District of New York.

6 Section 703(h), 42 U.S.C. § 2000e-2(h), provides:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or

by negative implication makes it an unlawful employment practice "for an employer to give and to act upon the results of" a "professionally developed ability test" where the test itself, its administration or action upon its results is "designed, intended or used to discriminate because of race. . . ." Assuming, as appellees argue, that even though Section 1981 and Title VII are independent, if overlapping, remedies, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), it is desirable nevertheless that the substantive law relating to what is discrimination be the same under both Section 1981 and Title VII. The provisions of Title VII are by no means inconsistent with, indeed they seem to compel, the original determination in this suit that the supervisory examinations were unconstitutionally discriminatory. *Chance v. Board of Education (Chance I)*, 330 F. Supp. 203, 224 (S.D.N.Y. 1971) (preliminary injunctive relief given), *aff'd*, 458 F.2d 1167 (2d Cir. 1972). Extensive negotiations and additional proceedings in the district court culminated in the entry on July 12, 1973, of a final judgment against the Board of Examiners. This order prohibited the continued implementation of the old discriminatory examination system, mandated the institution of an interim system for filling vacant positions and

quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

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ordered the development of a permanent new selection system. These orders were again upheld by this court in *Chance v. Board of Education (Chance II)*, 496 F.2d 820 (2d Cir. 1974).

Meanwhile, however, the Board of Education had directed community school boards to fill supervisory vacancies in accord with the "transfer list" provisions of the union contract. This resulted in giving priority to those supervisors who had acquired seniority with licenses obtained under the old discriminatory examination system. On December 27, 1973, Judge Mansfield, acting as district judge, held that "the transfer provisions of the [union] agreement, by giving a preference to senior supervisory personnel, violates our Orders." Recognizing that timing in the framing of equitable decrees seeking to remedy past discrimination is of the utmost importance, however, he was then extremely careful to say that

This interpretation should not be construed as permanently prohibiting the use of seniority as a basis for selection and appointment of applicants. Following the adoption of a permanent non-discriminatory system for the selection of supervisors in the New York City School System there will undoubtedly come a time when seniority among those selected under such a system can be appropriately recognized. To give preference to those appointed under a discriminatory testing system, however, which is the effect of the [union] agreement's transfer provisions, would be to reward the very discriminatory practices which we have outlawed.

No appeal was taken from this order and Judge Tyler, to whom the case was assigned, declined by order of February 25, 1974, to rescind or alter it. The union's appeal

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from Judge Tyler's February 25, 1974, order was dismissed as not appealable. *Chance v. Board of Education (Chance III)*, 497 F.2d 919 (2d Cir. 1975).

In July, 1974, the Board of Education submitted proposed rules to govern "excessing" of supervisors. These would have required that persons whose positions are to be abolished, and those junior to them holding similar or lower positions, be relocated, demoted or terminated, as the case might be, in order of reverse seniority. Appellees opposed the rules on the basis that, like the transfer provisions of the union agreement, the proposed excessing rules would conflict with the remedial purposes of the orders affirmed in *Chance II* which had held the qualifying exam to be unlawful and had ordered development of a new selection system. After five hearings and assorted submissions Judge Tyler issued an order on November 22, 1974, which, in all material respects, is identical to the order of February 7, 1975, here under appeal. This order permits the use of seniority excessing rules only insofar as the proportion of blacks and Hispanics "excessed" does not exceed the proportion of black and Hispanic supervisors presently employed in each school district and the school system as a whole. His order was made effective retroactively to July 30, 1974, and prospectively until November 30, 1977.

On timely application of the Board of Education the order was modified in certain respects not material here on February 7, 1975. This appeal was brought from that order. I should add that I agree with the majority's view that the February order is final and appealable.

In evaluating the propriety of Judge Tyler's excessing quota order, it is necessary to consider three separate questions: first, whether the order is unconstitutional; second, whether the order is forbidden by statute under 42 U.S.C.

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§ 2000e-2(h), see note 6 *supra*; third, whether, if not prohibited by statutory or constitutional law, the order is within the equitable authority of the trial court. These issues will be discussed in order below.

I think the remedial relief afforded was constitutionally allowable for the reasons stated so well by my brother Mansfield, dissenting from the denial of rehearing en banc in *Kirkland v. New York State Department of Correctional Services*, Nos. 74-2116, 74-2258 (2d Cir. Dec. 10, 1975), slip op. 1003. I need add to his remarks only that it would have been constitutionally permissible, and I think also within the district court's powers, to base "excessing" on some principle other than racial percentage—merit, constructive seniority, sharing of the available work or the like. Just as veterans' preferences permissibly reward those for service to their country, given hiring (or firing) preferences favoring those of a minority race (or I would add the female gender) who have been victimized by discrimination until a fair equality of treatment is achieved seem to me to be constitutionally proper. The purpose of the order is to protect, to a limited extent, the black or Hispanic teachers who have recently been made supervisors in retention of their employment, not because they are black or Hispanic but because they have previously been discriminated against by unconstitutional examinations. See Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 Colum. L. Rev. 534, 555 (1975). See also Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 (1974). But cf. Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 Colum. L. Rev. 559, 571-73 (1975). On the other side of the scale, the white supervisory personnel disadvantaged by the district court's order would not, it must be presumed from the decisions in *Chance I* and *Chance II*, *supra*, necessarily have gained

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their preferred place on the seniority ladder were it not for the fact that the qualifying examinations were discriminatory against nonwhites. Thus, they are not in the position, say, of a DeFunis whose superior qualifications are overlooked in favor of less qualified minority students; the white supervisory personnel whose seniority is entrenched by the majority (subject, perhaps, to constructive seniority for the Chance class) have been the very people who have benefited from the school system's prior discriminatory policies. The suggestion that bumping seniors is "constitutionally forbidden reverse discrimination" may find support in dictum in *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 428-29 (2d Cir. 1975). It may be that it can also find support elsewhere. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 333, 343-44 (1974) (Douglas, J., dissenting). I find it a little ironic, however, that the Supreme Court authority cited by the majority is Mr. Justice Murphy's concurring opinion in *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 209 (1944), where the Court construed the Railway Labor Act to require a railroad brotherhood to represent all members of the craft union and not to discriminate against a Negro member on account of his race. Justice Murphy's remark that "[t]he Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color," *id.*, is merely a statement of the protective nature of the shield provided to minorities by the Fourteenth Amendment—it should not be applied out of context as a sword to prevent remedial relief, in the form of affirmative action, for those who have suffered the discrimination which the Amendment condemns. The powers of a court of equity to eliminate the effect of past discrimination are broad, *Louisiana v. Black*, 380 U.S. 145, 154 (1965), and seem clearly to encompass the affirmative, remedial action

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ordered here, as recognized in *United States v. Montgomery County Board of Education*, 395 U.S. 225, 236 (1969), and *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971). See also *Kirkland v. New York State Department of Correctional Services*, Nos. 74-2116, 74-2258 (2d Cir. Dec. 10, 1975), slip op. at 1006-10 (Mansfield, J., dissenting from denial of rehearing en banc) (citing cases from our court and seven other circuits).

Complaints of reverse discrimination have to be evaluated constitutionally with careful regard to the facts of each case, since any affirmative action to correct past discriminatory practices may result in what seems to be unfairness to those who have benefited by those practices. The complaint of "reverse discrimination" should not be allowed to obscure the need for action to be taken to reverse, or negate, the effects of unlawful discrimination found to exist, as in this case. The focus of our concern should be upon whether there is an accurate method of redressing past discrimination in such a way as to benefit those who have been discriminated against only at the expense, if at all, of those who gained undue advantage by the discrimination. If an accurate method cannot be had, then we may examine whether some rougher form of relief, as for instance a percentage preference, achieves a measure of fair redress at no undue expense.

Before reaching these last two questions it is necessary here to respond to the majority's view that Judge Tyler's order was forbidden as a matter of law by Section 703(h) of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(h), note 6 *supra*. In this regard it may be conceded that the majority appears to be upon firmer ground than in its constitutional argument. The majority relies upon *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3505 (U.S. Mar. 18, 1975); *Jersey Central Power*

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& Light Co. v. *Electrical Workers Local* 327, 508 F.2d 687 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3084 (U.S. Aug. 1, 1975), and *Watkins v. Steel Workers Local* 2369, 516 F.2d 41 (5th Cir. 1975). The *Waters* and *Jersey Central* courts have each read the legislative history of Title VII as indicating that layoffs made pursuant to plant-wide seniority systems that operate in a facially neutral manner are pursuant to "bona fide" seniority plans and cannot, therefore, constitute unlawful employment practices under Title VII. See 42 U.S.C. § 2000e-2(h); note 6 *supra*. They reached this result even where the result of the seniority plans was to entrench the effect of prior discrimination against minority workers. See *Jersey Central*, *supra*, 508 F.2d at 710; *Waters*, *supra*, 502 F.2d at 1317; but see *id.* at 1320. Other courts and commentators have been more circumspect, however, regarding the fair implications of the legislative history of Title VII. Judge Van Dusen, concurring in *Jersey Central* only for the purpose of agreeing in the necessity of a remand for further findings, expressly disagreed with the *Jersey Central* majority's reading of Title VII. He found "persuasive the writers who contend that the legislative history indicates that Congress did not intend to preclude remedies altering plant seniority which perpetuates discrimination." 508 F.2d at 712 (emphasis added), citing, e.g., *Cooper & Sobol, Seniority and Testing Under Fair Employment Law: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1629 (1969); Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. Pa. L. Rev. 158, 163-64 (1974). See also Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1552 (1975) (legislative history of Title VII inconclusive as to scope of protection intended for "bona fide" seniority systems). This reading of Title VII is, in fact, suggested

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by the plain language of 42 U.S.C. § 2000e-2(h), which does no more than to declare that bona fide seniority systems, cannot, of themselves, constitute an unlawful employment practice. This provision stops far short of stating that where, as in the present case, unlawful employment practices *other than bona fide seniority systems* have been found to have resulted in discrimination against minority workers, courts may not, in the exercise of their *remedial authority* alter the effect such seniority plans may have in entrenching the results of the prior discrimination.⁷ The courts have already recognized this remedial-substantive law distinction, at least by necessary implication. Where a facially neutral departmental seniority system has the effect of discriminating, in the layoff situation, against minority employees who have recently transferred into that department as a result of the employer's termination of prior unlawful practices, the courts have all recognized that giving constructive, or "plantwide," seniority as a means of protecting the transferred employees is a proper remedial order. *See, e.g., Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), cert. granted, 420 U.S. 989 (1975); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971). Even the courts in *Waters*, *supra*, 502 F.2d at 1320, and *Jersey Central*, *supra*, 500 F.2d at 705 & n.48, have acknowledged the propriety of the plantwide seniority remedy to prevent the entrenchment of past departmental discriminations. The third case cited by the majority, *Watkins*, is consistent, rather than conflicting, with the analysis which suggests

⁷ The opinion in *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 428 (2d Cir. 1975), pointedly distinguished *Chance v. Board of Education*, 330 F. Supp. 203 (S.D.N.Y. 1971), on the basis that the *Chance* proof of past discrimination was much clearer. *Kirkland*, incidentally, also involved "permanent" quotas. 520 F.2d at 428.

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that even though bona fide seniority systems are substantively lawful under 42 U.S.C. § 2000e-2(h), they may be disturbed as part of the remedy for *other* unlawful discriminatory practices. In the *Watkins* case the Fifth Circuit panel was most cautious in holding that the bona fide seniority system there challenged was only protected "where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination." 416 F.2d at 45. It is the absence of an identifiable independent discriminatory practice or substantive law violation, and that alone, which in *Watkins*, and one might add in *Jersey Central* as well, forecloses remedial interference with bona fide seniority systems.

Our present case is, of course, quite different from the *Watkins*, *Waters* and *Jersey Central* cases. We have before us the history of a discriminatory practice which has resulted in a prolonged failure to hire black and Hispanic supervisors into the New York school system. *See note 7 supra*. As part of the remedial effort to bring minority supervisor applicants who have suffered past discrimination into the New York schools, and to maintain them there, and as a remedy to offset the loss of unknown years of deserved seniority, I submit that it is permissible to alter the "bona fide" seniority system of the school system *even if* that seniority system does not itself independently constitute an unlawful employment practice. This conclusion, that remedial authority may require action to be taken which substantive law would not itself independently require, is by no means a novel concept in the jurisprudence of equal protection. *See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 17, 31. In fact, in my view the majority opinion in this case has itself conceded this principle, at least implicitly, by directing

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the district court to consider the use of "constructive seniority" to afford relief to minority workers in the class of plaintiff Chance. Clearly the grant of such artificial seniority is but a construct for interfering with what the majority insists is a "bona fide" seniority system. That is to say, the majority's continued insistence upon the sanctity of the seniority system which it deems "bona fide" is inconsistent with a willingness to grant remedial interference with that system in the form of "constructive seniority."

Having crossed what I believe to be the misconceived hurdle of Title VII, and recognizing the continuing integrity of the remedial powers of the district court, we are still left with the difficult problem whether the particular remedy chosen by the district court is reasonably designed to help those who have suffered from discrimination without unduly harming others. At this level of consideration it is apparent that the district judge faced several choices. He could have followed the approach suggested by the majority, which would grant constructive seniority to those in Chance's class back to the mean appointment date of persons who took and passed the discriminatory exam which persons like Chance took but failed. Were Chance's class the only one involved in this litigation this remedy would appear to represent a sufficient conciliation of the interests of the previously discriminated and previously favored employees. *But see note 3 supra.* But the present suit involves another (and much larger) class, composed of persons like plaintiff Mercado who never took the discriminatory examinations but who were discouraged from taking them by knowledge of their discriminatory characteristics. The district court could well have considered that it was necessary to give constructive seniority to members of Mercado's class, as well as Chance's. *See Note, Last Hired, First Fired Lay-*

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offs and Title VII, supra, 88 Harv. L. Rev. at 1557-60. This seems especially likely in view of the fact that the members of Mercado's class far outnumber those in Chance's class, *see note 5 supra*, and that a remedy for the latter alone would therefore be quite inadequate for the litigation as a whole. But in many cases it would be difficult, if not impossible, fairly to compute constructive seniority for these persons who were discouraged from ever applying to take the discriminatory examination. The use of a few broad parameters for determining constructive seniority has been suggested in such a case. 88 Harv. L. Rev. at 1559. One approach might be to give members of Mercado's class seniority equal to the average seniority of nonminority workers of the same age. *Id.* Another possibility would be to assume that persons in Mercado's class were interested in becoming supervisors (which seems likely because they have now applied for these jobs) and would have applied to take a nondiscriminatory exam as soon as they were qualified, in terms of years of service as teachers, to do so. Assuming a person could take the exam after, say, four years of teaching experience, constructive seniority could be given to members of Mercado's class as of the mean appointment date for those who passed the first examination given after the class member had taught for four years. Had the district judge determined that some relief of this type was necessary to afford appropriate relief for the members of Mercado's class, the majority's arguments directed against quotas as such would be inapplicable. While the computation of such constructive seniority would provide only a rough measure of justice among the affected persons, this is a situation where perfect justice seems impossible to attain. A greater objection to the "constructive seniority" approach suggested here is that its administrative difficulties may be substantial, if not overwhelming. If pre-examination re-

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quirements include more than merely years of teaching experience,⁸ there may be no convenient criteria from which "constructive seniority" for members of Mercado's class could be computed.

A third possible remedy, the one chosen by the district court here, avoids the considerable administrative difficulties which may well exist under the constructive seniority method once, as seems necessary to me, the problem of Mercado's class, or persons mentioned in note 3 *supra*, is considered. Use of a quota for limiting the layoffs of minority supervisors is an easily implemented device which provides substantial protection for both of the discriminated classes in this suit. It is true that the measure of justice afforded by the quota technique may in some instances be considerably rougher than that obtained by the constructive seniority approach.⁹ Considering the situa-

8 Discussion of other prerequisites to the supervisor's examination is shown in *Chance v. Board of Examiners*, 330 F. Supp. 203, 207 (S.D. N.Y. 1971). One such prerequisite is "two years' experience of supervision in day schools under license and appointment, or . . . various alternative experience requirements." *Id.* Whether the district court could or should factor such considerations into a constructive seniority computation for members of Mercado's class cannot be determined at this appeal. These complications might well, however, weigh severely against use of the constructive seniority method in this case. Judge Tyler was after all deciding a case involving human, not mathematical, equations.

9 For example, a minority person who took and failed the discriminatory examination ten years ago may, under the quota system, be laid off before a white or minority supervisor appointed under the nondiscriminatory selection system if the former happened to have been appointed a supervisor after the other two. Also, a black or Hispanic supervisor is protected by the quota and may be laid off only after whites appointed before him have been, even if he passed the discriminatory examinations, or even if he became a supervisor after the discriminatory examinations were outlawed and had never failed or been discouraged from taking them. The majority is quite correct in pointing out that the quota method protects all minority supervisors, even those who were able to overcome the discrimination to achieve their position or who were never discriminated against. While this

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tion as it lay before the district court, however, with the inability of the interested parties to agree on a fair remedy, with a multiplicity of diverse interests and problems of administering relief as well as difficulties in finely tuning other relief to suit exactly ascertainable equities, I cannot conclude that the quota is so broad and rough a measure of justice that it was beyond the discretion of the trial court. The appellants have forwarded no data suggesting that the quota sweeps in substantial numbers of persons not entitled to relief, and therefore I assume that this effect is not great in this case. And, while the quota technique may also hypothetically operate quite inexactly, it cannot be denied that the constructive seniority approach is rather artificial in its performance too. I cannot, then, conclude that the quota order appealed from was an abuse of the discretion of the district court, at least where as here it is dealing with an interim situation only. Rather, here I believe we should adhere to the guidance of the Supreme Court in *International Salt Co. v. United States*, 332 U.S. 392, 400 (1947), which suggests that "[t]he framing of decrees should take place in the District rather than in Appellate Courts."

In summary, I believe that the three important questions before us in this case have been incorrectly decided by the majority. The use of quotas as a remedial limitation on the layoff of minority personnel hired as the result of court-ordered changes in discriminatory employment practices does not violate the Constitution. Nor do such quotas, when they are used as a remedy for past discriminatory practices, violate Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). Finally, the quality of the justice obtained by the use of

effect does not make the quota an unconstitutional form of "reverse discrimination," it can be argued to weigh against the reasonableness of the quota as a remedial device for use by the district court.

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the quota is not so rough that, considering the imperfection of the alternative remedies and the administrative convenience of the quota, the order therefor was an abuse of discretion.

I therefore dissent.

APPENDIX B-OPINION OF THE COURT OF APPEALS ON REHEARING

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1112, 1251—September Term, 1974.

(Decided January 19, 1976.)

Docket Nos. 75-7161, 75-7164

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

v.

THE BOARD OF EXAMINERS, et al.,

Defendants,

and

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant-Appellant,

and

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY
OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,

Intervenor-Appellant.

Before:

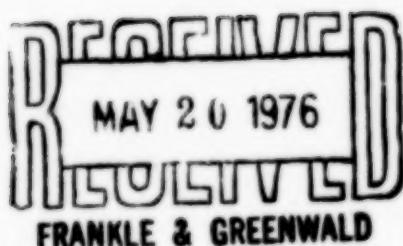
OAKES, VAN GRAAFEILAND and MESKILL,

Circuit Judges.

ON REHEARING

PER CURIAM:

Following our original opinion in this case a petition for rehearing and suggestion for hearing en banc was timely filed by the plaintiffs-appellees. While such petition was under consideration by the court, another panel decided *Acha v. Beame*, No. 75-7388 (2d Cir. Feb. 19, 1976), and the Supreme Court decided *Franks v. Bowman Transportation Co.*, 44 U.S.L.W. 4356 (U.S. Mar. 24, 1976). Both these cases support the relief of constructive seniority afforded by this court to the plaintiffs in the Chance class, those who took and failed discriminatory supervisory examinations. They also bear on the relief to be afforded to the members of the Mercado class, so-called, those who "have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination to be discriminatory and unrelated to job performance." *Chance v. Board of Examiners*, 70 Civ. 4141 (S.D.N.Y. May 21, 1973) (order of Mansfield, J.), at 7. Accordingly we modify so much of our prior decree as relates to the Mercado class and order that the case be remanded to the district court with directions to accord constructive seniority to the members thereof who have heretofore established or can establish by the usual preponderance of the evidence that they qualify as such.



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APPENDIX C

Ordering Denying Rehearing *in banc*UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of June, one thousand nine hundred and seventy-six.

75-7161
75-7164

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,
Plaintiffs-Appellees,
—v.—

THE BOARD OF EXAMINERS, et al.,
Defendants,
THE BOARD OF EDUCATION OF THE CITY OF N.Y.,
Defendant-Appellant.
—and—

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE
CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,
Intervenor-Appellant.

A petition for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by counsel for the appellees, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is
Order that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge

Supreme Court, U. S.
FILED

OCT 8 1976

IN THE
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-344

COUNCIL OF SUPERVISORS AND ADMINISTRATORS
OF THE CITY OF NEW YORK, LOCAL 1, SASCO,
AFL-CIO,

Petitioners,

(ADDITIONAL PARTIES ARE NAMED ON NEXT PAGE)

BRIEF OF RESPONDENT BOARD OF EDUCATION IN
RESPONSE TO PETITION FOR CERTIORARI

W. BERNARD RICHLAND,
Corporation Counsel of
the City of New York,
Attorney for Respondent
Board of Education,
Municipal Building,
New York, N.Y. 10007.
(212) 566-3322 or 4337

L. KEVIN SHERIDAN,
LEONARD KOERNER,
DEBORAH G. ROTHMAN,
of Counsel.

BOSTON M. CHANCE, LOUIS MERCADO, et al.,
THE BOARD OF EXAMINERS AND THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK: GERTRUDE
E. UNSER, individually and in her capacity
as Chairman of the Board of Examiners; JAY
E. GREENE, MURRAY ROCKAWITZ and PAUL DENN,
individually and in their capacities as
members of the Board of Examiners; MURRAY
BERGSTRAUM, individually and in his
capacity as President of the Board of
Education, et. al.,

Respondents.

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ON THE UNDERLYING ISSUE OF
RACIAL DISCRIMINATION IN
HIRING FOR PUBLIC EMPLOYMENT,
THE DISTRICT COURT, IN 1971,
AFTER REVIEWING LENGTHY AFFI-
DAVITS AND EXHIBITS AND TAKING
ORAL TESTIMONY, FOUND THAT THE
CHALLENGED EXAMINATIONS DIS-
CRIMATED AGAINST BLACKS AND
PUERTO RICANS AND THAT SUCH
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LATED, AND AFTER THE DISTRICT
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-344

COUNCIL OF SUPERVISORS AND ADMINISTRATIONS
OF THE CITY OF NEW YORK, LOCAL 1, SASCO,
AFL-CIO,

Petitioners,

BOSTON M. CHANCE, LOUIS MERCADO, et. al.,
THE BOARD OF EXAMINERS AND THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK: GERTRUDE
E. UNSER, individually and in his capacity
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E. GREENE, MURRAY ROCKAWITZ and PAUL DENN,
individually and in their capacities as
members of the Board of Examiners; MURRAY
BERGSTRAUM, individually and in his
capacity as President of the Board of
Education; et al.,

Respondents.

BRIEF OF RESPONDENT BOARD OF EDUCATION IN
RESPONSE TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

1. Does the decision of this Court in Washington v. Davis, ___ U.S. ___, 96, Ct. 2040 (1976), require a reversal of an award of constructive seniority where the District Court, in 1971, after reviewing lengthy affidavits and exhibits and taking oral testimony, found that the challenged examinations discriminated against blacks and Puerto Ricans and that such examinations were not job related, and, after the District Court's determination was upheld by the Court of Appeals, the Board of Education began hiring supervisory personnel pursuant to new examination procedures, which have continued up to the present time?
2. Did the Court of Appeals err, in providing for constructive seniority for those plaintiffs who took and failed the challenged

examinations and in permitting those members of plaintiffs' class, who have failed to apply for or take supervisory examinations because they reasonably believed such examinations to be discriminatory and unrelated to job performance, to be afforded constructive seniority if they can establish that they qualify for such by preponderance of the evidence.

FACTS

(1)

In 1971, plaintiffs Chance and others, who are blacks and Puerto Ricans, on behalf of themselves and those similarly situated, brought suit against the New York City school system's Board of Examiners and the New York City Board of Education under federal civil rights laws 42 U.S.C. §§ 1981, 1983

(7a-8a).* Plaintiffs claimed that competitive examinations given by the Board of Examiners to those seeking permanent supervisory positions in the City's schools discriminated against blacks and Puerto Ricans and so violated the Equal Protection Clause of the Fourteenth Amendment (18a-19a).

On the application for a preliminary injunction, the Court held a hearing in which oral testimony was taken, and the Court had submitted to it lengthy affidavits with exhibits and extensive briefs of law and facts by all the parties (27a).

*Numbers followed by "a" refer to pages in the Appellant's Appendix submitted on a prior appeal in this case, Docket # 2320 decided in 496 P. 2d 820. Numbers preceded by "A" refer to pages in the appendix attached to the Petition for Certiorari. Numbers not followed by any letter refer to the Joint Appendix submitted on the appeal in the Court of Appeals.

On July 14, 1971, the District Court, in an opinion, granted the preliminary injunction (23a et seq.; reported at 330 F. Supp. 203). The Court found that the challenged examinations did have a "de facto effect of discriminating significantly and substantially against qualified blacks and Puerto Rican applicants" (42a-43a). The Court then noted that, where the plaintiffs show that the examinations result in substantial discrimination, the Board of Examiners are then required to show that the examinations are job related (45a). The Court in its opinion then reviewed in detail the evidence" with respect to the validity, reliability and objectivity of the examinations" conducted by the Board of Examiners (46a). The Court concluded that the Board had not established that the exami-

nations were job related (62a).

The District Court wrote a second opinion on September 17, 1971, commenting on the forms of a proposed preliminary injunction which were submitted by the various parties (66a). The preliminary injunction, issued on September 17, 1971, enjoined the defendants from conducting further examinations, promulgating eligible lists or issuing licenses and making regular or permanent appointments (70a-71a). It ordered defendants to make all vacant supervisory positions available "on an acting basis" to candidates who satisfied eligibility requirements established by state law and by the City Chancellor and the Board of Education (71a).

An appeal was taken to the Court of Appeals by the Board of Examiners, not by

the Board of Education or by the Chancellor (72a-73). The Board of Education had not actively opposed the motion for a preliminary injunction. The Court of Appeals upheld the preliminary injunction.

458 p. 2d 467 (1972).

During the proceedings on the application for a preliminary injunction, the Council of Supervisors and Administrators (hereafter CSA) moved to intervene. The motion was denied. 51 F.R.D. 156. CSA filed an amicus brief on the appeal from the granting of the preliminary injunction.

Extensive settlement talks followed. On April 2, 1973, counsel for the plaintiffs and defendant Board of Examiners submitted to the Court a draft of a proposed stipulation of settlement (163a). The stipulation provided for an interim appointment procedure providing those appointed

with the status of permanent employees (98a-100a). The Board of Education objected to the stipulation (111a). The Chancellor approved the stipulation (117a-122a).

On May 21, 1973, the District Court approved the stipulation as to those defendants who had approved it (164a-171a). A further memorandum approving the stipulation was issued on July 10, 1973 (272a). On July 12, the Court modified the order granting a preliminary injunction and entered an order providing for the appointment of supervisory personnel on a permanent basis by the community school boards or the Board of Education (274a-280a). On that same date, the District Court entered a final judgment against the Board of Examiners and the Chancellor, both of who had joined with the plaintiffs in the stipulation (308a-316a).

The Board of Education appealed from the order modifying the preliminary injunction. On April 12, 1974, the Court of Appeals affirmed, 496 F. 2d 820.

CSA attempted to participate in the settlement discussions and the subsequent appeal but was denied intervenor status. See 496 F. 2d at p. 822, n. 4.

(2)

During the pendency of the second appeal to the Court of Appeals, the plaintiffs moved to have the District Court clarify (1) the orders entered on July 12, 1973, (2) the final judgment against the Board of Examiners and the Chancellor pursuant to their stipulation of settlement and (3) the preliminary injunction entered against all the remaining defendants.

This application sought to determine whether the orders governed not only the

initial appointment to supervisory positions of applicants who had never been appointed to fill vacancies in the school system but also the filling of vacancies by transfer and appointment of licensed personnel holding other regular positions.

On December 27, 1973, the District Court held that the provisions of the collective bargaining agreement relating to vacancies were inconsistent with the orders of July 12, 1973, and that the Board was prohibited from preferring licensed personnel over unlicensed personnel who were otherwise qualified for existing vacancies. CSA, who participated in this portion of the proceeding, appealed to the Court of Appeals (the Board of Education did not appeal). On May 15, 1974, the appeal was dismissed (Docket No. 74-1334)

In July 1974, the Board of Education indicated to the District Court that it was drafting a plan to revise existing rules and regulations concerning the excessing (reassignment or discharge of supervisory personnel when budgetary cutbacks or reorganization require the elimination of positions) of supervisory personnel in all of the schools of the City of New York (29-30). The Board of Education informed the District Court that it would seek the Court's approval of such rules consistent with the final judgment in the case (id.).

CSA was permitted to intervene in the proceeding (11, 27).

On July 24, 1974, the Board of Education sent the District Court a copy of the proposed excessing rules (35). The rules provided for excessing based on seniority.

On November 22, 1974, the District Court, accepting the plaintiffs' proposal, issued a final order on excessing. The order established a racial quota system for excessing. The order provided that each community school board which intended to excess would be required to excess supervisors so that the racial percentage of supervisors in the school district before the excessing would be the same as the racial percentage of supervisors in the district after excessing (330).

On January 17, 1975, the Board of Education submitted a new proposed order (362-368). The order would permit a supervisor appointed after the injunction was granted on September 17, 1971 to be entitled to seniority for the purpose of excessing based "on the mean (midpoint)

date of appointment from the list of the examination", given prior to September 1, 1971, "he or she failed provided he or she was eligible for appointment when the list was promulgated" (365).

On February 7, 1975, the District Court rejected the proposed order and issued a final order on the excessing problem. The order provided for the racial quota system. At the time the District Court issued its final order, it filed an opinion (395-396). The Court stated that it recognized that facially neutral seniority systems had been upheld in Waters v. Wisconsin Steel Worker, Inc., 502 F. 2d 1309 (7th Cir., 1974), cert. den. 44 U.S.L.W. 3676 (Docket No. 74-1350, May 25, 1976) and Jersey Central Power Light Co. v. Electrical Workers Local 327, 508 F. 2d 687 (3rd Cir., 1975), judg.

vacated 44 U.S.L.W. 3669 (Docket No. 182, May 25, 1976). It concluded that the better view was expressed by the District Court in Watkins v. United Steelworkers Local 2369, 369 F. Supp. 122 (E.D. La., 1974) [subsequently reversed 516 F. 2d 41 (5th Cir., 1975)] which had held that company-wide seniority systems may be held to violate Title VII if found to perpetuate the effects of past discrimination.

(5)

The Court of Appeals (one judge dissenting) reversed the order of the District Court holding that a facially neutral excessing plan, which operates on the concept of "last hired-first fired" does not discriminate against minorities who are disproportionately affected (A7a). The Court stated that it agreed with the

decisions of the Third Circuit in Jersey Central Power and Light Co. v. Local Union 327, I.B.E.W., 508 F. 2d 68) (3rd Cir., 1925), judg. vacated 44 U.S.L.W. 3669 (Docket #182, May 25, 1976) and Waters v. Wisconsin Steel Works Inc., 502 F. 2d 1309 (7th Cir., 1974), cert. den. 44 U.S.L.W. 3676 (Docket No. 74-1350, May 25, 1976) (A8a).

The Court noted that the Board of Education had indicated its willingness to accord constructive seniority to those minority supervisors who had failed a challenged examination (Alla). The Court of Appeals suggested that the District Court adopt the Board of Education's proposal (Alla).

The plaintiffs-appellees filed a timely petition for a rehearing and suggestion for rehearing en banc. While

the petition was under consideration, this Court decided Franks v. Bowman Transportation Co., ____ U.S. ____ , 96 S. Ct. 1851 (1976). On May 16, 1976, the Court of Appeals, citing Franks and its own decision in Acha v. Beame 531 F. 2d 678 (2d Cir., 1976), decided after Chance, granted the petition for rehearing and modified its decree to accord constructive seniority to those members of the plaintiffs' class who could establish that they "have failed to apply for or take such examinations because they reasonably believed the supervisory examination to be discriminatory and unrelated to job performance" (A30a).

(6)

During the pendency of the appeal to the Court of Appeals of the excessing order of February 7, 1975, the District

Court, on March 25, 1975, entered a final order incorporating a permanent plan for hiring of supervisors. On April 9, 1976, the Board of Education moved to modify this order and plan. In a decision dated June 1, 1976, the Board of Education's motion was granted. The Board of Examiners opposed this motion and appealed the decision of the District Court to the Court of Appeals. This appeal is presently pending in the Court of Appeals. Docket No. 76-7348. CSA attempted to participate in these proceedings in the District Court but was denied intervenor status.

POINT I

THE DECISION OF THIS COURT IN
WASHINGTON V. DAVIS, U.S.
, 96 S. CT., 2040 (1976)
DOES NOT REQUIRE A REVERSAL OF
AN AWARD OF CONSTRUCTIVE
SENIORITY WHERE, ON THE UNDER-
LYING ISSUE OF RACIAL DISCRIMI-
NATION IN HIRING FOR PUBLIC
EMPLOYMENT, THE DISTRICT COURT,
IN 1971, AFTER REVIEWING LENGTHY
AFFIDAVITS AND EXHIBITS AND
TAKING ORAL TESTIMONY, FOUND
THAT THE CHALLENGED EXAMINATIONS
DISCRIMINATED AGAINST BLACKS AND
PUERTO RICANS AND THAT SUCH
EXAMINATIONS WERE NOT JOB RELATED,
AND AFTER THE DISTRICT COURT'S
DETERMINATION WAS UPHELD BY THE
COURT OF APPEALS, THE BOARD OF
EDUCATION BEGAN HIRING SUPER-
VISORY PERSONNEL PURSUANT TO
NEW-EXAMINATION PROCEDURES,
WHICH PROCEDURES HAVE CONTINUE
UP TO THE PRESENT TIME.

In Washington v. Davis, __ U.S. __,
96 S. Ct. 2040 (1976), unsuccessful black
applicants for employment as police
officers in the District of Columbia
brought a civil rights action under 42
U.S.C. 1983 challenging the hiring and

examination procedures. The District Court, noting the absence of any claim of intentional discrimination, found that the examination had a discriminatory impact on blacks and that the test had not been validated to establish its reliability for measuring subsequent job performance. The District Court then stated that, while that showing sufficed to shift the burden of proof, the petitioners were not entitled to any relief because, among other things, the test was a useful indicator of training school performance. 96 S. Ct. at p. 2045.

The Court of Appeals reversed and directed summary judgment for the plaintiffs finding that the disproportionate impact on blacks resulting from the examination procedures established

a constitutional violation absent any proof by the City that the test adequately measured job performance.

This Court, in reversing the Court of Appeals and upholding the District Court's dismissal of the complaint, held that to prove a racial discrimination in violation of the Equal Protection Clause the plaintiffs must establish a racial discriminatory purpose. This Court noted that the constitutional issue in a 1983 action is different from an action brought under Title VII where the plaintiffs may establish a cause of action by showing the racially differential impact of the challenged hiring or promotion practices.

96 S. Ct. at p. 2047.

This Court then concluded that the District Court's determination in defendants favor should be upheld. The Court

noted that the District Court, after reviewing the evidence, had found that the challenged examination was job related and such determination was not erroneous. 965 Ct. at p. 2053.

Washington v. Davis is distinguishable from the instant case. As noted above, Washington involved only a constitutional challenge to hiring procedures prior to 1972. In the instant case, the order granting a preliminary injunction enjoining the defendants from conducting further examinations and making appointments to supervisory positions was issued in 1971. That order was affirmed by the Court of Appeals in 1972. The defendant Board of Examiners (the Board of Education and the Chancellor did appeal the order) did not petition this Court for review. After the unsuccessful appeal, the District Court approved new

procedures for the selection of supervisors in the New York City School System. These procedures are being used at the present time.

Title VII was made applicable to municipalities in 1972, during the pendency of this lawsuit. The plaintiffs here could have amended the complaint to add a Title VII cause of action. There was no reason to do so only because, in 1972, all the parties had agreed to comply with the new procedures for the selection of supervisors, which procedures were approved by the District Court.

In 1974, when the issue of excessing arose, no party to the proceeding including the CSA, challenged the finding of the District Court in 1971 on the underlying issue of discrimination. If the issue had been raised, the plaintiffs

could have amended their complaint to add a cause of action under Title VII. The evidence in the instant case of discriminatory impact would have established a cause of action under Title VII.

Washington v. Davis, a hiring case, cannot be construed to require, in a firing case, the dismissal of an action commenced five years earlier without giving the plaintiffs an opportunity to amend.

As we noted above, this Court in Washington refused to substitute its judgment for that of the District Court which had determined that the examination was job related. In this case, the District Court, after reviewing all the evidence, determined that, under any test of equal protection, the challenged examinations could not be justified (55a-56a, 62a). This finding was confirmed by the Court of Appeals, 458

F. 2d 1167, 1177 (2d Cir. 1972). These determinations are not clearly erroneous.

POINT II

THE BOARD OF EDUCATION, IN ITS PROPOSED ORDER OF JANUARY 17, 1975, PROVIDED FOR CONSTRUCTIVE SENIORITY TO THOSE PLAINTIFFS WHO TOOK AND FAILED THE CHALLENGED EXAMINATIONS. SINCE THE DECISION OF THE COURT OF APPEALS, UPON REHEARING, THE BOARD HAS BEGUN TO IMPLEMENT PROCEDURES TO AFFORD CONSTRUCTIVE SENIORITY TO THE OTHER PLAINTIFFS WHO QUALIFY. REVIEW BY THIS COURT AT THIS POINT IN THE PROCEEDING, FIVE YEARS AFTER THE PROCEEDING WAS COMMENCED, WOULD BE INAPPROPRIATE.

The decision of the Court of Appeals, upon rehearing, provided for constructive seniority to the plaintiffs in the Chance class, those who took and failed discriminatory supervisory examinations. In addition, the decision permitted the plaintiffs in the Mercado class, those who "have failed to apply for or take such supervisory

examinations because they reasonably believed the supervisory examinations to be discriminatory and unrelated to job performance, to establish in the district court that "they qualify as such" (30a).

The decision of the Court of Appeals comports with the policies of the Board of Education. During the hearings on the seniority issue, on January 17, 1975, the Board of Education submitted a proposed order providing for constructive seniority to the plaintiffs in the Chance class.

On August 25, 1976, on interim order was entered in the District Court providing that the members of both the Chance and the Mercado classes shall be given an opportunity to prove their entitlement to constructive seniority. On September 25, 1976, CSA filed a notice of appeal to the Court of Appeals from the District Court's

interim order.

The Board has begun to implement procedures to provide constructive seniority to those members of the Mercado class who qualify. A review by this Court at this point in the proceedings, five years after the commencement of the litigation, would be inappropriate.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI
SHOULD BE DENIED.

October 7, 1976.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of
the City of New York,
Attorney for Respondent,
Board of Education.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
DEBORAH G. ROTHMAN,
of Counsel.

NOV 3 1976

IN THE

Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1976

No. 76-344

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE
CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,

Petitioner,

v.

BOSTON CHANCE, LOUIS MERCADO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JACK GREENBERG
ERIC SCHNAPPER
DEBORAH M. GREENBERG
PATRICK O. PATTERSON
10 Columbus Circle
New York, New York 10019

ELIZABETH B. DUBois
271 Madison Avenue
New York, New York 10016

GEORGE COOPER
435 West 116th Street
New York, New York 10027

JEANNE S. FRANKL
20 West 40th Street
New York, New York 10018
Attorneys for Respondents

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
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BRIEF IN OPPOSITION

Opinions Below

The unreported order of the district court is reprinted at 11 CCH E.P.D. ¶ 10,632. The opinions of the court of appeals are reported at 534 F.2d 993 and are set out in the appendix to the petition.

Supplemental Statement of the Case

Plaintiffs (respondents here) brought this class action in September 1970 under 42 U.S.C. §§ 1981 and 1983, and under various provisions of the New York State Constit-

tution and Education Law,¹ challenging the practices used to select supervisory personnel in the New York City public school system on the grounds that those practices were irrational, invalid, and unreliable and that they discriminated unlawfully against minority groups. The named defendants were and are the Board of Examiners and the Board of Education of the City of New York, the members of those boards, and other public officials charged with the administration and operation of the school system.

In October 1970, the petitioner here, the Council of Supervisors and Administrators of the City of New York, Local 1, SASOC, AFL-CIO (hereinafter "CSA" or "petitioner"), made its first motion to intervene as a party to the action pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. The motion was denied on the grounds that CSA did not have a sufficient legal interest in the proceedings and that, in any event, CSA's alleged interest would be adequately represented by the existing parties and by the independent counsel retained by the Board of Examiners to defend the suit. 51 F.R.D. 156 (S.D.N.Y. 1970). CSA never appealed this decision.

After extensive proceedings, the district court found that the challenged selection practices were unlawful and granted preliminary injunctive relief against the defendants. 330 F.Supp. 203 (S.D.N.Y. 1971). This decision was affirmed in all respects by the court of appeals. 458 F.2d 1167 (2d Cir. 1972).

Extensive negotiations and further proceedings resulted in the entry, on July 12, 1973, of a final consent judgment against the defendant Board of Examiners and a modified

¹ N.Y. Const., Art. 5, § 6; N.Y. Educ. Law §§ 2590-j(3)(a)(1), 2569(1), 2573(10) (McKinney 1970). These provisions establish the basic parameters of the New York City Board of Education's civil service system.

preliminary injunction against the defendant Board of Education. 8 CCH E.P.D. ¶ 9520 (S.D.N.Y. 1973). These orders were affirmed on an appeal taken by the Board of Education, 496 F.2d 820 (2d Cir. 1974), and the Board of Education subsequently entered its consent to the July 12, 1973 judgment. This consent judgment mandated the development of a permanent new selection procedure and the institution of an interim system for the appointment and licensing of supervisory personnel. Under this interim procedure, supervisors could be licensed if they had filled a vacancy on an acting basis for at least five months and were found by the Board of Examiners to have performed satisfactorily in that capacity.

In July 1974, the Board of Education began contemplating the "excessing" of a number of supervisors and submitted proposed rules to govern that process. These rules would have required that supervisory personnel whose positions are abolished, and those persons junior to them holding similar or lower positions, be relocated, demoted, or terminated in inverse order of their seniority. Plaintiffs challenged these proposed rules on the ground that they would effectively abrogate rights obtained under the consent judgment and would have a serious discriminatory impact on recently appointed minority supervisors.

At this point, CSA moved again for general intervention in the proceedings concerning the proposed excessing rules. The district court entered another order denying the motion but granted CSA limited intervention "in proceedings before this Court addressed to interpretation, modification or abrogation of provisions regarding 'excessing' of supervisory personnel in the currently effective collective bargaining agreement between CSA and defendant Board of Education . . ." (Order entered July 18, 1974).

On the merits of the dispute concerning the seniority excessing rules, the district court entered an order in November 1974, and a modified order in February 1975, requiring that any excessing be carried out without affecting the proportions of black and Hispanic supervisors in the school system. The defendant Board of Education and the intervenor CSA appealed. In its brief to the court of appeals, CSA relied on the district court's July 1974 grant of limited intervention as the basis for its status as an appellant in the litigation. CSA did not appeal from or contest the district court's denial of its motion for general intervention.

On the merits of the appeal, a majority of the court of appeals panel reversed the district court's order and remanded the case with directions to fashion a remedy according constructive seniority to individual class members who had failed prior discriminatory examinations. 534 F.2d 993, 999 (2d Cir. 1976) (11a). After this Court decided *Franks v. Bowman Transportation Co.*, 47 L.Ed. 2d 444 (1976), the court of appeals panel modified its decree to provide that, on remand, constructive seniority should also be accorded to individual class members who could prove that they had failed to apply for or take prior supervisory examinations because they reasonably believed those examinations to be discriminatory and unrelated to job performance. 534 F.2d at 1007 (30a). Petitioner CSA seeks a writ of certiorari to review these decisions.

In July 1976, the defendant Board of Examiners, still represented by the same independent counsel referred to in the district court's denial of CSA's original motion to intervene in 1970, filed a notice of appeal from a separate district court order, concerning procedures for the selection, appointment, and licensing of supervisory personnel.

One of the issues which the Board of Examiners has presented for review by the court of appeals is essentially the same as the first question presented by the petitioner here: *i.e.*, whether this case should be dismissed in its entirety on the basis of this Court's decision in *Washington v. Davis*, 48 L.Ed. 2d 597 (1976). This appeal is now pending before the court of appeals (No. 76-7348, 2d Cir.), and CSA has been granted *amicus curiae* status in it.

Reasons For Denying the Writ

1. Petitioner has been granted only limited intervention in this case² and is not entitled to any review of the underlying determination of liability embodied in the July 1973 consent judgment. Petitioner's repeated motions for general intervention as a party have been denied by three successive district judges; petitioner has never taken a

² In its petition (p. 9), CSA states that it "moved to intervene as a party defendant, and its motion was granted by the District Court on July 18, 1974." In fact, in its motion and proposed order, CSA requested leave to intervene "for the purpose of representing the interests of its members in connection with consideration of a plan for excessing supervisory employees which will be presented to this Court" (CSA Proposed Order filed July 10, 1974). This motion was denied. The language of the district court's order, from which petitioner never appealed, is as follows:

1. The motion of CSA is granted insofar and only insofar as it seeks participation for CSA as intervenor in proceedings before this Court addressed to interpretation, modification or abrogation of provisions regarding "excessing" of supervisory personnel in the currently effective collective bargaining agreement between CSA and defendant Board of Education, and specifically the provisions of Article VII, L of a certain agreement between said contracting parties covering the period October 1, 1972-October 1, 1975;
2. In all respects other than those set forth above, the motion of CSA is denied.

timely appeal from any of these orders;³ and petitioner has never sought this Court's review of any of these denials.⁴ Its indirect attempt to gain in this Court a right which has consistently been denied it below, without appeal, is clearly barred by time. Moreover, petitioner has not made any showing of changed circumstances which might justify overturning these decisions of the courts

³ These orders were clearly appealable. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

⁴ The opinion denying CSA's first motion to intervene is reported at 51 F.R.D. 156 (S.D.N.Y. 1970) (Mansfield, J.). During the proceedings culminating in the entry of the July 1973 consent judgment, another CSA motion to intervene was denied, 6 CCH E.P.D. ¶ 8977 (S.D.N.Y. 1973) (Mansfield, J.), and CSA again failed to appeal.

Later in 1973, when a dispute arose concerning the filling of supervisory vacancies, CSA participated in district court proceedings on this issue, and the court stated in a December 1973 decision that CSA had been "granted the rights of an intervenor for the limited purpose of contesting the issue raised by plaintiffs with respect to the transfer provisions of the CSA agreement." 7 CCH E.P.D. ¶ 9084, at p. 6576 (S.D.N.Y. 1973) (Mansfield, J.).

In January 1974, in response to yet another CSA motion for unlimited intervention, this time addressed to the second district judge assigned to the case, the court reaffirmed the limited intervention rights specified in the December 1973 order, but denied CSA's request for general intervention. (Endorsement on Order To Show Cause To Intervene, Jan. 21, 1974) (Tyler, J.). Once again, CSA did not appeal the denial. When it later attempted to raise this issue on an appeal on the merits from a subsequent order declining to rescind the December 1973 order, its appeal was dismissed without opinion. 497 F.2d 919 (2d Cir. 1974).

CSA's next attempt to intervene resulted in the order of July 18, 1974 (Tyler, J.), which is reprinted in the preceding footnote, and from which CSA never appealed.

In April 1976, prior to final action by the court of appeals on the decision which CSA now asks this Court to review, and subsequent to the assignment to the case of its third successive district judge, CSA made still another motion in the district court for unlimited intervention. In an unpublished order dated May 2, 1976, and for the reasons stated in previous orders denying previous motions, the court (Pollack, J.) again denied CSA's motion to intervene. As in the past, CSA did not appeal the denial.

below.⁵ Any interest which petitioner might have in the underlying liability issues continues to be diligently, competently, and aggressively represented by the Board of Examiners and its independent counsel in the appeal which is now pending before the court of appeals (No. 76-7348, 2d Cir.). Finally, the grant of limited intervention to petitioner, to contest certain aspects of the relief after liability had been determined, has ample precedent with no conflict in the circuits,⁶ and it is in keeping with the settled rule "that intervention will not be allowed for the purpose of impeaching a decree already made." *United States v. California Cooperative Canneries*, 279 U.S. 553, 556 (1929); *Stell v. Savannah-Chatham County Board of Education*, 255 F.Supp. 88, 92 (S.D. Ga. 1966). Since petitioner is not and never has been a party to this case on the underlying question of liability, it is not entitled to seek review on the merits of that issue. 28 U.S.C. § 1254(1). See *UAW Local 283 v. Scofield*, 382 U.S. 205, 208-09 (1965); *Brotherhood of Railroad Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 524 (1947).

2. Even if petitioner were entitled to seek review of the underlying determination of liability this Court's decision in *Washington v. Davis*, 48 L.Ed.2d 597 (1976), would not require any modification of that determination. The Court held in *Davis* that *de facto* racial impact alone, without

⁵ CSA apparently believes that the recent decision in *Washington v. Davis*, 48 L.Ed.2d 597 (1976), somehow revives the claim for unlimited intervention and makes its sudden reassertion here timely. However, *Davis* does nothing to modify the facts or the law on that claim. Even if the *Davis* decision has some bearing on the merits of the determination of liability in this case, it has nothing whatsoever to do with the correctness and finality of the repeated denials of intervention on that issue.

⁶ *EEOC v. American Tel. & Tel. Co.*, 506 F.2d 735 (5th Cir. 1974); *Spangler v. Pasadena City Bd. of Educ.*, 427 F.2d 1352 (9th Cir. 1970); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); *Moore v. Tangipahoa Parish*, 298 F.Supp. 288 (E.D. La. 1969).

some evidence of a discriminatory racial purpose, will not trigger the "rigid scrutiny" test of equal protection review. The petition is wrong in suggesting that the 1972 decision of the court of appeals in this case was based on constitutional standards which were overturned by *Davis*. Rather, this court of appeals decision granting preliminary relief expressly acknowledged the *Davis* issue and found it unnecessary to reach "this most difficult question" because

"the present examinations were not found to be job-related and thus are 'wholly irrelevant to the achievement of a valid state objective' The Board, then, failed to meet its burden even under the rational relationship standard, which would be the least justification that the Constitution requires." 458 F.2d 1167, 1177-78 (2d Cir. 1972).

Nothing in *Davis* requires any reconsideration of this decision. Moreover, even if the court of appeals had applied a "rigid scrutiny" standard, its decision would remain fully supportable on the basis of plaintiffs' claims under 42 U.S.C. § 1981 and under provisions of New York law requiring the challenged examinations to measure "merit and fitness" and to be periodically reviewed to determine their "validity and reliability." N.Y. Const., Art. 5, § 6; N.Y. Educ. Law §§ 2569(1) and 2590-j(3)(a)(1). This Court acknowledged in *Davis*⁷ that such statutory provisions continue to require a strict examination of testing procedures, at least where those procedures have racially discriminatory effects. 48 L.Ed.2d at 611-14.

3. Even if the 1972 decision of the court of appeals had been wrong under the *Washington v. Davis* constitutional

⁷ Contrary to the assertion of the petition (p. 11), *Washington v. Davis* was not "a § 1983 case," but rather was a case brought under the due process clause of the Fifth Amendment, under 42 U.S.C. § 1981, and under D.C. Code § 1-320. 48 L.Ed.2d at 603.

standard and could not be sustained on independent statutory grounds, there would be no justification for reopening the underlying determination of liability in this case. That determination is embodied not in the court of appeals' preliminary injunction decision but in the July 1973 final consent judgment. In entering into this consent judgment, the parties accepted a compromise settlement and waived their rights to litigate the liability issues. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). The subsequent resolution in *Davis* of one legal issue among the many that were implicated in the parties' decision to settle does not constitute the "extreme hardship" or "oppression" necessary to justify the reopening and modification of a consent judgment. *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932); *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 813 (8th Cir. 1969); *Lubben v. Selective Service System*, 453 F.2d 645, 651 (1st Cir. 1972). The absence of any such circumstances is particularly apparent in view of the fact that the consent judgment in this case simply imposes the same requirements as Title VII of the Civil Rights Act of 1964, as amended in 1972 to cover public employers, 42 U.S.C. § 2000e *et seq.*, would impose even if this suit had never been filed. If the consent judgment were reopened, plaintiffs would presumably be free to invoke those Title VII standards directly via an amended complaint. See *Washington v. Davis*, 48 L.Ed.2d at 614.

4. Even if the Court does not agree with the reasons set out under points 2 and 3 above, it should nonetheless deny this petition because a pending appeal by the party to this case which is charged with primary representation on these issues, the Board of Examiners, is now raising the same issues before the court of appeals.⁸

⁸ See p. 5, *supra*. For the convenience of the Court, respondents are lodging with the clerk of this Court copies of the briefs which are being submitted to the court of appeals by the appellant Board of Examiners and by the respondents.

5. As for the constructive seniority relief mandated by the court of appeals, CSA is admittedly a proper party to seek certiorari. However, that relief presents no novel or unsettled issues.

(a) This relief does not conflict with any seniority excessing system prescribed by New York law.⁹ Plaintiffs have not been granted "modification or elimination of the existing seniority system, but only an award of the seniority status they would have individually enjoyed under the present system but for the illegal discriminatory refusal to hire." *Franks v. Bowman Transportation Co.*, 47 L.Ed.2d 444, 458 (1976). To the extent that New York law could conceivably be interpreted to require conduct which perpetuates the effects of the prior unlawful selection systems, it would stand as an obstacle to the attainment of rights granted by the United States Constitution and federal statutes, and it would be in direct contravention of federal court orders determining those rights. It would, therefore, be clearly invalid under the supremacy clause of the Constitution. See *DeCanas v. Bica*, 47 L.Ed.2d 43, 53 (1976); *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963).

(b) There is no "conflict" between the relief granted by the court below and the decisions of the New York Court of Appeals cited at pages 16 and 19 of the petition. These decisions concern the powers of state agencies and state courts under state law, and they are therefore inapposite to the question presented here, which is one of federal judicial power to remedy violations of federal statutory and constitutional provisions.

⁹ Petitioner erroneously cites N.Y. Educ. Law § 2585 (McKinney 1970), which does not appear to provide a seniority system for supervisory personnel. However, a newly enacted provision of N.Y. Educ. Law, § 2588(3)(b), seems to authorize such a system for layoffs. Ch. 251, McKinney's Session Law News at 1074 (Aug. 10, 1976).

(c) Petitioner's invocation of the "business necessity" doctrine provides no reason for this Court to review the decision below. Defendant's discriminatory selection practices were examined long ago and were found to be unrelated to job performance and "wholly irrelevant to the achievement of a valid state objective." 458 F.2d at 1177 (2d Cir. 1972). This Court has firmly rejected the argument that the purposes served by a seniority system are of sufficient importance to justify perpetuation of the effects of such past discrimination by the denial of constructive seniority relief. *Franks, supra*, 47 L.Ed.2d at 465. Moreover, the relief granted by the court below contributes to the retention of qualified supervisors who were licensed on the basis of meaningful on-the-job evaluations, see 496 F.2d 820, 823-24 (2d Cir. 1974), whereas the seniority system advocated by petitioner would give preference to supervisors who were chosen on the basis of examinations found to be no "better than drawing names out of a hat," 458 F.2d 1167, 1175 (2d Cir. 1972). Such a system cannot be justified as a business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-35 (1975).

(d) The relief fashioned by the court of appeals is entirely consistent with this Court's decision in *Franks, supra*, in according constructive seniority not only to minority supervisors who failed prior discriminatory examinations (11a), but also to minority supervisors "who have heretofore established or can establish by the usual preponderance of the evidence" that they "have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination to be discriminatory and unrelated to job performance" (30a). This Court has found "untenable" petitioner's contention "that this form of relief may be denied merely because the interests of other employees may thereby be affected," 47 L.Ed.2d at 468, and there appears to be no conflict in the circuits on the

availability of such relief to persons who were deterred from applying for employment or promotion by discriminatory practices.¹⁰ The relief afforded by the court of appeals does nothing more than meet this Court's requirement that the individual victims of unlawful discrimination be granted constructive seniority as a necessary part of the "make whole" remedy to which they are entitled. *Franks, supra*; *Albemarle Paper Co., supra*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JACK GREENBERG

ERIC SCHNAPPER

DEBORAH M. GREENBERG

PATRICK O. PATTERSON

10 Columbus Circle

New York, New York 10019

ELIZABETH B. DU BOIS

271 Madison Avenue

New York, New York 10016

GEORGE COOPER

435 West 116th Street

New York, New York 10027

JEANNE S. FRANKL

20 West 40th Street

New York, New York 10018

Attorneys for Respondents

¹⁰ See *Acha v. Beame*, 531 F.2d 648, 656 (2d Cir. 1976); *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 731 (5th Cir. 1976); *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 233-35 (4th Cir. 1975); *Jones v. Lee Way Motor Freight Inc.*, 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971); *United States v. Sheet Metal Workers Local 36*, 416 F.2d 123, 132 (8th Cir. 1969).

Supreme Court, U. S.
F I L E D
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IN THE

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976

No. 76-344

COUNCIL OF SUPERVISORS & ADMINISTRATORS
OF THE CITY OF NEW YORK, LOCAL 1, SASOC,
AFL-CIO,

Petitioner,

—against—

BOSTON CHANCE, LOUIS MERCADO, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

LEONARD GREENWALD
80 Eighth Avenue
New York, N.Y. 10011
Counsel for Petitioner

Of Counsel:

GRETCHEN WHITE OBERMAN
FRANKLE & GREENWALD

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Respondents.

PETITIONER'S REPLY BRIEF

This brief is submitted in reply to the briefs in opposition filed by respondents Boston Chance, et al. (hereafter the plaintiffs) and respondent Board of Education.

1. Respondent's Attempts To Salvage The First Chance (458 F.2d 1167) Decision From The Overruling Effect Of *Washington v. Davis*, 96 S. Ct. 2040 Are Unavailing.

Despite respondents attempts to resuscitate the decision in *Chance I* (458 F.2d 1167), that case was specifically disapproved and overruled by *Washington v. Davis*, *supra*, 96 S.Ct. at 2050 n.12. The arguments made to demonstrate that this Court erred in including *Chance I* in the list of cases *Davis* overruled are specious.

The court of appeals in *Chance I* held that the "heavy burden of justifying its contested examination" shifted to the defendant Board of Examiners in the conceded absence of any proof by plaintiffs of "intentionally discriminatory legislation . . . or even a neutral scheme applied in a discriminatory manner . . ."; but only because ". . . the district court found that the Board's examinations have a significance and substantial discriminatory impact" on minority applicants. (458 F.2d at 1175).

Under *Davis*, the prerequisite to shifting the burden of proof to the defendant to justify an official practice is proof by plaintiffs of a *prima facie* case of racial discrimination. This is established either by proving that the official practice is intentionally discriminatory or by proving that it is a neutral scheme applied in a discriminatory manner (96 S.Ct. at 2048). A *prima facie* case sufficient to shift the burden to the defendant is not made out simply by showing that the practice in question "may affect a greater proportion of one race than another." 96 S.Ct. at 2049.

The reason for requiring proof of discriminatory racial purpose in an equal protection case is self-evident: How can "a law establishing a racially neutral qualification for employment [be] nevertheless racially discriminatory and [deny] 'any person equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Washington v. Davis, supra*, 96 S.Ct. at 2050. More than a showing of disproportionate racial impact is necessary because the fact that more Negroes than whites have been disqualified from employment by a given test does "not demonstrate that respondents individually were being denied equal protection of the laws by the application of an otherwise valid qualifying test being administered to prospective . . . recruits." 95 S.Ct. at 2051.

And in this context an "otherwise valid qualifying test" does not mean one which the defendants prove is job related, as the court of appeals in *Chance I* required (458 F.2d at 1176), but only a test which is "a racially neutral qualification for employment" 96 S.Ct. at 2050.

In *Chance I*, the plaintiffs established only that a racially neutral qualification for employment—one concededly not intentionally discriminatory or applied in a discriminatory manner—had the unintended result of adversely affecting a greater proportion of one race than another. By being unable to prove anything more than this, they failed to establish a *prima facie* case of invidious discrimination under the equal protection clause as interpreted in *Washington v. Davis, supra*.

Respondents ignore entirely the holdings in *Chance I* on proof of a *prima facie* case, and the diametrically opposite holding in *Davis* on the same issue. They focus instead only on the proper test to be applied once a *prima facie* case is established and the burden of proof has shifted. (See especially Plaintiffs Br. 8) By tailoring their arguments in this respect, they demonstrate that they have engaged in obfuscation, not elucidation, of the real issues involved in this case.

2. The Board Of Examiners Appeal To The Second Circuit Has No Impact Whatever On The Issues Presented In This Petition.

Plaintiffs argue that this petition must be denied "because a pending appeal by the party to this case which is charged with primary representation on these issues, the Board of Examiners, is now raising the same issue before the court of appeals." (Br. 9)

What they fail to disclose to the Court is that a decision below favorable to the Examiners on the *Davis*

issue will have absolutely no effect upon the award of constructive seniority already made to members of their class if certiorari is denied in this case.

The award of constructive seniority at issue here was made by the court of appeals on May 17, 1976, two months before the Examiners took their appeal from a totally separate order of the district court modifying a prior consent judgment regulating the content and administration of future examinations for supervisory positions in New York City. The Examiners appeal will not be argued until January, 1977.

In this brief to the circuit, the Examiner make it clear that they only:

"... seek to vacate the concert judgment insofar as it now has *prospective* application. They do not wish to disturb licenses issued or other rights, privileges or perquisites obtained, under that Judgment." (emphasis in the original) (Br. 27, f.n.)*

The award of constructive seniority by the court below has already been made and it will become final and irrevocable if certiorari is denied in this case.

If certiorari is denied here, and the Examiners prevail in the court below on the *Washington v. Davis* argument, then plaintiffs will have succeeded in obtaining constructive seniority for member of their class despite for a subsequent dismissal of their entire cause of action, simply because certiorari denied and seniority rights vested in this case before the Examiners appeal was decided. This

* The plaintiffs have lodged their brief and the Examiners' Court of Appeals brief in this Court (Plaintiffs Br. 9 n.8). For completeness, the CSA amicus brief filed in that case is also being lodged with the Clerk of the Court.

result would be absurd and should not be permitted to occur.

If the Court wishes to insure that this case and the Examiners appeal run parallel courses, it can decide this case now to give the circuit court proper guidance in the Examiners case; or remand this case to the circuit with directions to consider the *Washington v. Davis* question here presented in conjunction with the Examiners appeal; or defer action upon this petition until the circuit has rendered its decision*; or even grant certiorari in this case, allowing the Examiners to petition for review immediately without awaiting the court of appeals decision. See *Porter v. Dicken*, 328 U.S. 252, 254 (1959). Any of these alternatives would prevent the otherwise real possibility that seniority rights could well vest under a judgment subsequently vacated simply because the timing in this case and the Examiners appeal below were out of phase.

3. Plaintiffs Arguments On The Effect Of Petitioner's Status As Intervenor In This Case Are Irrelevant To The Issues Before This Court.

The plaintiffs cite many cases for the truism that intervention will not be allowed for the purpose of impeaching a decree already made. (Br. 7). They cite no cases —nor are there any—which hold that once intervention is granted and while the intervenors' appeal is pending, an intervenor is precluded from urging the appellate court to apply the law in effect at the time of its decision, even

* This course of action would mean that the legislation begun in 1970 would continue into its eighth year—a result already strongly cautioned against by Judge Feinberg in the second *Chance* case 496 F.2d 820, 825.

if the law was different at the time of the lower court's decision. *Cf. United States v. Schooner Peggy*, 5 U.S. 10, 110 (1801); *McComb v. Crane*, 174 F.2d 646 (5th Cir. 1949).

In this petition, we ask only that the Court assess the correctness of the court of appeals grant of constructive seniority below in light of the intervening change in the law brought about by *Washington v. Davis, supra*. We have not asked the Court to vacate the decrees entered in this case prior to our intervention,* but only to hold that under *Davis*, no member of plaintiffs' class is entitled to constructive seniority to remedy past discrimination in hiring, because none were victims of the invidious discrimination prohibited by the equal protection clause.

Even if the CSA is deemed bound by the 1970 injunction decree and the 1972 consent decree despite the fact that it was not permitted to intervene below until 1974, this does not change the result. Even where the parties to a prior judgment are the same, the doctrines of collateral estoppel and res adjudicata cannot be successfully invoked where the legal rule applicable to the same facts has been changed between two proceedings. *Systems Federation v. Wright*, 364 U.S. 642 (1961); *Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975); *Bush v. Commissioner*, 175 F.2d 391 (2d Cir. 1949) (cited and discussed at pp. 3-6, CSA Amicus Brief in the court below)

The reason for refusing to estop even a party from relying on a subsequent change in the law is most appropriate in this case:

"If collateral estoppel were applied in this situation, a judgment would petrify the law as to the

* This is the relief requested by the Board of Examiners in its appeal presently pending in the court below.

[party] who won or lost, so that a subsequent change of law would not affect him, and his treatment under the supplanted legal principle would be unfairly advantageous or disadvantageous." 1B Moore's Federal Practice, § 0.448, p. 4237.

By asking this Court to disregard the overruling effect of *Washington v. Davis, supra*, upon the decision below and to deny certiorari, the plaintiffs are actually asking that they be given unfairly advantageous treatment under a supplanted legal principle.*

4. Respondent's Remaining Arguments Are Question-begging

Plaintiffs reliance on *Franks v. Bowman*, 47 L.Ed.2d 444 (1976) to answer our Point II is misplaced. *Franks* is the beginning, not the end, of the inquiry we urge this Court to undertake in this case if summary judgment is denied. The question here is not whether *Franks* authorizes a constructive seniority award, but whether it is authority for doing so in a case where the seniority system involved is mandated by state statute, in this case N.Y. Ed. Law § 2585;* whether is is au-

* Plaintiffs also attempt to justify the award on the ground that the judgments below merely impose the same requirements as Title VII, as amended in 1972, hence the relief already gotten could be obtained in any event via an amended complaint. (Br. 9). They conveniently overlook the fact that the 1972 amendments to Title VII have not been applied retroactively to conduct occurring before the effective date of the amendment where the employer is not the federal government, in the very circuit in which they would have to seek such relief. *Monell v. Department of Social Services*, 532 F.2d 259 (2d Cir. 1976).

* Plaintiffs confusion about which state statute is involved in this litigation (Br. 10 n.9) was not shared by the Court of Appeals below. (Opinion of the Court of Appeals, Petitioners Appendix, 3a n.1)

thority for doing so in a case involving pedagogical personnel, not factory workers; and whether it is authority for doing so when the highest court of the state involved has refused to remedy past employment discrimination by ordering a public employer to violate other valid provisions of state civil service law. We argued that certiorari was proper here as these questions have not yet been decided by the Court. The plaintiffs' failure to cite a single case to the contrary fully substantiates our claim that these questions are novel ones warranting a grant of certiorari in this case.*

CONCLUSION

For these reasons, and those previously stated, the judgment and opinion of the Second Circuit should be summarily reversed; alternatively, a writ of certiorari to review that judgment and opinion should be granted.

Dated: New York, New York
Nov. 10, 1976

Respectfully submitted,

LEONARD GREENWALD
80 Eighth Avenue
New York, N.Y. 10011
Counsel for Petitioner

Of Counsel:

GRETCHEN WHITE OBERMAN
FRANKLE & GREENWALD

* The Board of Education implies that the constructive seniority issue is dead because they have already begun to implement the lower court decision. No excessing occurred this year because the CSA membership gave up wage increases in order to retain jobs for persons who would have been excessed. (Amsterdam New Editorial, addendum A, petitioner's amicus brief). No further excessing will occur until September, 1977.